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CURRENT EVENTS.

WE have the highest regard for the editor of the *Advocate*, a semi-monthly legal journal, published at St. Paul, and we are free to say that, from time to time, we have found in its columns much of interest and value. We were particularly pleased with the editorial on "Libel Legislation," which appeared in its issue of April 1—the more so, perhaps, because a part of it was our own and appeared word for word in our editorial columns of an earlier date. The editor of the *Advocate* doubtless forgot to use quotation marks with what he copied of our article. He is welcome to make use of anything we say, if he deems it of sufficient interest and importance, but human nature is weak and man is vain and frivolous, at the best, and where one has, with great effort and labor, evolved from his inner consciousness, what he believes to be a great thought, he wants to have folks know it's his, especially when it goes away from home, and without reference to whether it is in fact a creditable offspring. Does'nt he, *Mr. Advocate?*

ON page 402 of this issue will be found an interesting case from the Alabama court, on the subject of the negotiability of certificates of stock. It is there held, in accordance with the weight of authority in this country, that certificates of stock in a corporation are not negotiable. The subject has been lately brought to the attention of the English courts, in connection with the question of negotiability of American railroad shares, and business men in the former country seem to be not a little alarmed at the recent decisions in the cases of The London & County Banking Co. v. The London & River Plate Bank, 20 Q. B. Div. 232, and Williams v. The London Chartered Bank of Australia, 38 Ch. Div. 388, wherein it is practically held that American railroad share certificates are not negotiable. It seems that, by a custom heretofore observed in the Stock Exchange, such shares are treated as if they were negotiable securities, and it was sought in one of the above cases to establish negotiability by proof of such custom, but Mr. Justice Manisty took the position that if the right of suing upon an instrument does not appear upon the face of it to be extended beyond one particular individual (referring to the blank endorsement of the original holder), no usage of trade, however extensive, will confer upon it the character of negotiability. Therefore, the English capitalist is becoming alarmed at the thought that he is practically dependent, in the purchase of American railroad shares, upon the good faith and honesty of the seller. An attempt is being made by a company called "The English Association of American Bonds and Shareholders," to confer the character of negotiability upon such securities, by a series of registrations in the name of the association and the issue of a new certificate, which upon its face is declared a negotiable instrument. Whether such an arrangement will be effectual in making shares legally negotiable within the decision of Mr. Justice Manisty remains to be seen. Probably at some future time the nature of the certificates of the association will be considered in the courts, and it will be interesting to see how far the attempt to create negotiable securities out of securities which are not negotiable has been successful.

THE Indiana legislature at its last session passed an act, intended to relieve the supreme court of that State, providing for a commission or an additional court, to be selected by the legislature to whom should be assigned for consideration and decision cases before the supreme court. It will doubtless be remembered that the contest upon this act partook largely of a political character, and in connection with its passage and enforcement certain sensational scenes were enacted, which, by many, were thought not to comport with the dignity of the subject. This act has now been declared unconstitutional by the supreme court, upon the ground that the people have a right to the courts established by and under the constitution, and this constitutional right the legislature can

neither alter nor abridge. Constitutional tribunals can not be changed by legislation, and the supreme court is a constitutional tribunal. It can be composed of judges only, for only judges can constitute a court. No part of the judicial duties of that court can be assigned to any other person than one of the duly chosen judges. The legislature has no power to change its organization, nor can that body under the guise of creating commissioners divide the duties of the judges, nor authorize it to be done. Under the constitution, as amended, the legislature may establish courts, but it cannot destroy the constitutional courts, nor can it change their organization, nor redistribute their powers, for these courts owe their organization to the constitution, and as the constitution has ordained that they shall be organized, so they shall be. In other words, that judicial power distributed by the constitution is beyond legislative control.

NOTES OF RECENT DECISIONS.

A question of the liability of stockholders came before the Supreme Court of the United States in Bank of Fort Madison v. Alden, 9 S. C. Rep. 332. There, a number of persons owning timber lands formed a corporation for the manufacture and sale of lumber, and the lands were conveyed to a trustee for the benefit of the corporation according to an agreement by which each member was to receive stock in proportion to his individual interest in the lands, the trustee accepting such lands in full payment of the shares issued. A creditor of the corporation sought to enforce the liability against a stockholder on the ground that the land conveyed by him in payment for his stock was worth much less in cash than the value of the stock, and hence that his subscription to the land was unpaid to the extent of the deficit. The court held that the creditor, having had full knowledge of the facts, could not maintain such an action, and says:

> The parties who became stockholders had, pursuant to a previous agreement, conveyed their lands to a trustee, in trust for the corporation formed, upon an understanding that stock should be issued to them in proportion to their individual interests in the property. The subscription was made upon this arrangement, and the parties acted with full knowledge of the conditions on which the property was to be transferred to a trustee, and the stock was to be issued to them. There was no attempt to pass off the property as different or more valuable than it was. There was no deception or misrepresentation of any kind in the case. No demand, therefore, against the estate of the deceased Waterman can be sustained upon the assumption that by the conveyance of his land he had not paid up all that he contracted or was bonnd to pay by his subscription. There was no credit given by the bank to the company upon any representation of a different set of facts than that which actually existed. The bank was owned by two of the stockholders of the company, Brewster and Smith, who had participated in, and had been well advised of, all that was done by the company. They held all the shares of the bank, and were respectively its president and cashier. Such being the case, the answer to the claims of the bank is found in the decision of this court in Coit v. Amalgamating Co., 119 U. S. 343, 7 S. C. Rep. 231. There the holder of a judgment against the corporation, being unable to obtain its satisfaction upon execution, and finding the company was insolvent, brought suit to compel the stockholders to pay what he claimed to be due and unpaid on the shares held by them. He contended that the valuation put upon the property taken for such stock was illegally and fraudulently made at an amount far above its actual value, but the court said: "If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the installments has been paid. In that case there is still a debt due to the corporation, which, if it become insolvent, may be sequestered in equity by the creditors as a trust fund liable to the payment of their debts. But where full paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account."

The question of infantile negligence or degree of care required of children, was considered by the Supreme Courts of Indiana and Ohio in Brazil Block Coal Co. v. Young, 20 N. E. Rep. 423, and Cleveland Rolling Mill Co. v. Corrigan, 20 N. E. Rep. 466. The Indiana court says:

> The authorities do make a distinction, and with sound reason, between children and adults. Persons of tender years must not be set to work in dangerous places by their employers, without due warning and instruction. Indeed, it is not always that warning and instruction will absolve the master. Hill v. Gust, 55 Ind. 45; Binford v. Johnston, 82 Ind. 426; Pennsylvania Co. v. Long, 94 Ind. 250; Engine Works v. Randall, 100 Ind. 293; Railroad Co. v. Pitzer, 109 Ind. 179, 6 N. E. Rep. 310, and 10 N. E. Rep. 70; Railroad Co. v. Fort, 17 Wall. 553; Coombs v. Railroad Co., 102 Mass. 572; Sullivan v. Manufacuring Co., 113 Mass. 396. "Notice of danger," says Dr. Wharton, in dis

cussing this question, "is not enough. The child must have sufficient instruction to enable him to avoid the danger." Whart. Neg. § 216. Not very different is the opinion of Mr. Wood, who says: "But in the case of young children a mere warning is not the measure of the master's duty. He must instruct him as to the methods of working with and about it, and it is negligence *per se* for him to put such a person to work with or in the vicinity of dangerous machinery until he has been made to understand the methods of using it as well as the hazards incident to its use." Wood, Mast. & Serv. § 350. The authorities to which we have referred do establish the doctrine that the master's duty is much broader in cases where young children are employed than in cases where the employees are of full age, but they do not fully determine the question before us, for that question is whether, conceding the duty to exist, any breach is shown. We suppose it to be clear that when a plaintiff charges a defendant with a negligent breach of duty he must state facts from which actionable negligence can be inferred, for the general rule is that negligence cannot be presumed. This general rule is uniformly applied to employers and employees, and it is presumed that the employer has done his duty. Railway Co. v. Sanford, *supra;* Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 12 N. E. Rep. 380. This presumption is, in effect, a *prima facie* case in favor of the employer. Railway Co. v. Thompson, 107 Ind. 442, 8 N. E. Rep. 18, and 9 N. E. Rep. 356. To defeat the presumption of duty performed it is necessary to state facts rebutting that presumption, otherwise there can be no cause of action. A violation of duty must therefore be shown, otherwise the complaint must be adjudged to be bad. This is so because culpable negligence cannot be presumed in aid of a complaint. Railway Co. v. Brannagan, 75 Ind. 490; Railway Co. v. Greene, 106 Ind. 279, 6 N. E. Rep. 603. The averment that there was no contributory negligence absolves the plaintiff from fault, but it does not show actionable negligence on the part of the defendant. It is one thing to show the plaintiff free from fault, and quite another to show the defendant in fault. The averment that the plaintiff and his son were free from negligence is not sufficient to cover the question here presented. Railway Co. v. Sanford, *supra.* The question here is, does the complaint show such fault on the part of the employer as to vest the employee with a cause of action? In order to show the defendant guilty of an actionable tort the complaint should have averred one of three things: First, that the plaintiff's son was too young to be put to the service he was required to perform; or, second, that neither he nor the plaintiff had notice or knowledge of the augmented danger caused by the master's neglect; or, third, that the master, knowing the age and inexperience of the child, neglected to give him the necessary warning and instruction.

The Ohio court says:

We have found no decision of this court upon the subject of the contributory negligence of infants, or the measure of care required of them in such cases. Elsewhere the cases are conflicted. Each of three different rules on the subject has found judicial sanction. One rule requires of children the same standard of care, judgment and discretion, in anticipating and avoiding injury, as adults are bound to exercise. Another wholly exempts small children from the doctrine of contributory negligence. Between these two extremes a third and more reasonable rule has grown into favor, and is now supported by the great weight of authority, which is that a child is held to no greater care than is usually possessed by children of the same age. Authors and judges, however, do not always employ the same language in giving expression to the rule. In Beach, Contrib. Neg. § 46, it is thus expressed: "An infant plaintiff who, on the one hand, is not so young as to escape entirely all legal accountability, and, on the other hand, is not so mature as to be held to the responsibility of an adult, is, of course, in cases involving the question of negligence, to be held responsible for ordinary care; and ordinary care must mean, in this connection, that degree of care and prudence which may reasonably be expected of a child." The decisions enforcing this rule—that children are to be held responsible only for such degree of care and prudence as may reasonably be expected of them, taking due account of their age and the particular circumstances—are very numerous. "It is well settled," says Mr. Justice Hunt, in Railroad Co. v. Stout, 7 Wall. 657, "that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. * * * The care and caution required of a child is according to his maturity and capacity only; and this is to be determined, in each case, by the circumstances of that case." In 1 Shear. & R. Neg. § 73, it is said to be "now settled by the overwhelming weight of authority that a child is held, so far as he is personally concerned, only to the exercise of such care and discretion as is reasonably to be expected from children of his age." "A child is only bound to exercise such a degree of care as children of his particular age may be presumed capable of exercising." Whit. Smith, Neg. 411. This rule appears to rest upon sound reasons, as well as authority. To constitute contributory negligence in any case, there must be a want of ordinary care, and a proximate connection between such want of care and the injury complained of; and ordinary care is that degree of care which persons of ordinary care and prudence are accustomed to use under similar circumstances. Children constitute a class of persons of less discretion and judgment than adults, of which all reasonably informed men are aware. Hence ordinarily prudent men reasonably expect that children will exercise only the care and prudence of children; and no greater degree of care should be required of them than is usual, under the circumstances, among careful and prudent persons of the class to which they belong. We think it a sound rule, therefore, that, in the application of the doctrine of contributory negligence to children, in actions by them, or in their behalf, for injuries occasioned by the negligence of others, their conduct should not be judged by the same rule which governs that of adults; and, while it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances.

The non-enforceability of a subscription to a church fund is well illustrated in the case of Presbyterian Church v. Cooper, 20 N. E. Rep. 352, decided by the New York Court of Appeals. There it was held that where defendant's intestate signed a subscription paper by which the signers agreed to pay to the trustees of plaintiff church the amounts set opposite their names, on condition that a certain fixed sum was subscribed, the fact

that other persons signed such subscription on the faith of the signature of the decedent constituted no consideration for the promise of the latter. The court says:

It has sometimes been supposed that when several persons promise to contribute to a common object desired by all, the promise of each may be a good consideration for the promise of others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise would not in a legal sense be beneficial to the promisors entering into the engagement. This seems to have been the view of the chancellor, as expressed in the Hamilton College Case, when it was before the court of errors (2 Denio, 417); and *dicta* of the judges will be found to the same effect in other cases. Trustees v. Stetson, 5 Pick. 508; Watkins v. Eames, 9 Cush. 527. But the doctrine of the chancellor, as we understand, was repudiated when the Hamilton College Case came before this court (1 N. Y. 581), as have been also the *dicta* in the Massachusetts cases, by the court in that State, in the recent case of Church v. Kendall, 121 Mass. 528. The doctrine seems to us unsound in principle. It proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors, and a failure to carry out, as between themselves, their mutual engagement. It is in no proper sense a case of mutual promises as between the plaintiff and defendant. If any action would lie at all, it would be one between the promisors for breach of contract. * * * Such consideration must therefore be found other than that expressly stated in the subcription paper in order to sustain the action. It is urged that a consideration may be found in the efforts of the trustees of the plaintiff during the year, and the time and labor expended by them during that time, to secure subscriptions in order to fulfill the condition upon which the liability of the subscribers depended. There is no doubt that labor and services rendered by one party at the request of another would constitute a good consideration for a promise made by the latter to the former, based on the rendition of the service. But the plaintiff encounters the difficulty that there is no evidence, express or implied, on the face of the subscription paper, nor any evidence outside of it, that the corporation or the trustees did, or undertook to do, anything upon the invitation or request of the subscribers. Nor is there any evidence that the trustees of the plaintiff, as representatives of the corporation, in fact did anything in their corporate capacity, or otherwise than as individuals interested in promoting the general object in view. Leaving out of the subscription paper the affirmative statement of the consideration (which for reasons stated may be rejected), it stands as a naked promise of the subscribers to pay the several amounts subscribed by them for the purpose of paying the mortgage on the church property, upon a condition precedent limiting their liability. Neither the church nor the trustees promise to do anything, nor are they requested to do anything, nor can such a request be implied. It was held in the Hamilton College Case, 1 N. Y. 581, that no such request could be implied from the terms of the subscription in that case, in which the ground for such an implication was, to say the least, as strong as in this case. * * * The cases of Barnes v. Perine, 12 N. Y. 18, and Robarts v. Cobb, 106 N. Y. 600, cited and distinguished.

Probably the most important case to banks and bankers, involving the question of application of deposits, that has lately appeared, is Grissom v. Commercial Nat. Bank, 19 S. W. Rep. 774, decided by the Supreme Court of Tennessee. There the defendant bank contended for the right, without further orders to apply certain moneys on deposit to plaintiff's credit, to the payment of plaintiff's note made payable there, taking the position that it has the power to treat a note so made as the equivalent of a check, and as a direction, therefore, on the part of the maker to pay same on his general account as a depositor. The court enter into a long and exhaustive review of the authorities, and conclude that the bank has no such authority in the absence of a usage or of instructions. They say:

The question is presented for the first time in this State, although it has received the attention of text writers, and been passed upon by the courts of other States, where we find a conflict of opinion. Under such circumstances it is our duty to determine the question for ourselves, upon reason and principle, and with a due regard for considerations of public policy and convenience, provided that, in doing so, we do not place our State in antagonism to the current of authority in this country. We recognize the fact that it is of prime importance that the several States in this Union should, as far as may be, without doing violence to well settled principles of State jurisprudence, endeavor to bring about and maintain as much certainty and uniformity of decision on questions of commercial law as can be accomplished. In response to this idea, we would, upon the question now before us, yield much of the strong conviction we entertain thereon in the endeavor to place ourselves in line with the current of authority, if a strong and steady current could be found, which would not threaten to engulf and destroy distinctions which have been long and well settled in this State. While we must concede that the weight of text-book authority is in support of defendant's contention, we are unable to discover that the weight of judicial decision is in the same direction. Moreover, we are constrained to believe that the contrary view is more in harmony with well settled adjudications in this State upon principles presenting analogous questions, and that the current of adjudged cases is certainly as strong in the same direction. Let us see, in the first place, what is the relation between depositor and banker. It is merely that of debtor and creditor, where the deposit is not a special one. The money deposited in the ordinary course of business is at once blended with the general funds of, and becomes the property of, the bank. The depositor has only a debt against the bank, payable on demand, upon the presentation and surrender of the draft or order addressed to and directing the bank in unequivocal terms to pay the amount of such draft to the person therein named, or to bearer. This order is commonly known in commercial and banking parlance as a "check." * * *

* * Is the liability of indorsers and sureties to depend upon the pleasure of the bank whether or not it will appropriate the deposits of the maker to the payment of his notes? If the banks should pay checks drawn on the day of the maturity of a note of the maker in favor of itself or of a third party, to the exhaustion of the drawer's deposits, is it to be liable to the holder of the note for not having withheld sufficient funds to pay the latter? And is a twin suit to be born out of the same transaction between the holder and the sureties or indorsers as to whether or not they have been thereby discharged; they, perhaps, having given notice to the bank that unless deposits sufficient are held they will claim their discharge? If the bank should, under such notice, deem it safe to withhold deposits sufficient for the note, is it to then encounter a suit with the holder of a check unpaid? Is the maker of a note, where there has been a total failure of consideration, giving him a good defense to the note as against the payee or purchaser, not in due course of trade, to be held liable to the bank, which, in the absence of deposits, has gone forward and paid the note for the maker, advancing the money therefor under the proposition, authorizing the bank to treat the note made payable months before at its house as equivalent to a check, or request to pay? On the other hand, if the bank should fail to pay a note so made payable where there were deposits sufficient, whereby the note is protested, is the bank to become a defendant to a suit for damages for injury to the credit and business of the maker, upon the authority of the proposition, to the effect that the note so made constituted the bank the maker's agent to protect his credit out of the latter's deposits? Illustrations of the inconvenience and hardships of the rule which we are urged to establish could be multiplied almost indefinitely, and are such as to readily suggest themselves to thoughtful men, acquainted with the practical affairs of commercial life. To hold a note payable at a particular bank as tantamount to a check on the bank, is to confound distinctions heretofore established and well settled in the adjudications of this State between notes and checks. A "check" is defined to be a "written order on a bank directing it to pay a certain sum of money." A "note" is the "written promise to pay another a certain sum of money at a certain time." One is payable on presentation, the other is payable on a day certain. One is entitled to days of grace, the other is not. One is an order on a third party, the other is the undertaking of the party himself. One is an appropriation of so much money in the banker's hands, the other is a *promise* to pay. On the check, ordinarily, no right of action accrues until after presentment for payment; on the note, a right of action against the maker exists without such presentment. Blair v. Bank, 11 Humph. 88; Mulherrin v. Hannum, 2 Yerg. 81; Springfield v. Green, 7 Baxt. 301; Bank v. Merritt, 7 Heisk. 190; Brown v. Lusk, 4 Yerg. 216. For these and other considerations we cannot yield our assent to the doctrine urged by the defendant, and upon which the case was decided in the court below. We hold, therefore, that there is no implied authority for a bank to pay to a third party a note made payable at its place of business simply because of the fact that the maker has funds sufficient for that purpose, in the absence of any course of dealing or previous instructions to so apply the deposits.

The opinion is so long it is impossible for us to do more than group the authorities cited *pro* and *con*. Those sustaining the decision of the court are: Wood v. Saving Co., 41 Ill. 267; Bank v. Patton, 109 Ill. 479; Scott v. Shirk, 60 Ind. 160; Bank v. Bank, 132 Mass. 151; Gordon v. Merchler, 34 La. Ann. 604; 1 Edw. Bills (3d Ed.), § 195; Newmark on Bank Deposit, 120. Those apparently in conflict with the court's opinion, or at least holding that it is the privilege of the bank to apply or not, as they please, such deposits to pay note of depositor, are: Lozier v. Horan, 55 Iowa, 75; Thatcher v. Band, 5 Sandf. 130; Bank v. Bank, 46 N. Y. 88; Bank v. Newton, 8 Bradw. (Ill) 563; Bolles on Banks, § 403; 2 Morse on Banking, § 557; Pratt's Banking Law, 44; Mendeville v. Bank, 9 Cranch, 9; Indig v. Bank, 80 N. Y. 106; Bank v. Henninger, 10 Pa. St. 496; Daniel on Negotiable Instruments, § 326*a*; Robarts v. Tucker, 16 Adol. & E. (N. S.) 578; Kymer v. Laurie, 18 Law J. Q. B. 218.

AN interesting question of trade-mark came before the Supreme Court of Minnesota in Cigar Makers' Protective Union v. Conhaim, 41 N. W. Rep. 943. The Cigar Makers' Union having many thousands of members, adopted or agreed upon a certain symbol or device to be used by their several members, by placing it on boxes of cigars made by such members; such device not indicating by what persons the cigars are made, but only that they are made by some member of one of such unions, the right to use the device belonging equally to each of all the members, and continuing only while the person remains a member. It was held (two of the judges dissenting) that it was not a valid trade-mark. The court says:

The right in trade-marks, or the exclusive right to use certain symbols or devices placed upon goods offered for sale, is property. Hence the law affords a remedy to the owner against one who violates the right. A trade-mark consists or a word, mark, or device adopted by a manufacturer or vendor to distinguish his productions from other productions of the same article. Hostetter v. Fries, 17 Fed. Rep. 620. The theory on which the right to it, as property, is based, is that a man may have acquired a reputation excellence in the manufacture or preparation of a certain article for sale, which reputation may be the source of profit to him. In the enjoyment of this reputation, and of the benefit and pecuniary advantages thereof, he ought to be protected as he ought to be and is in the advantages of the good will of a business established by him; and so that the purchasing public may know the origin of such articles when offered for sale, and that they are of his manufacture or preparation, he may adopt and place on them, as the index of their origin, some device or symbol not used by others

upon similar articles, which by such adoption, and by use in connection with his articles, come to be known as representing that the articles on which they are placed are made or prepared by him, just as his signature to a business paper in an assurance to others that he executed it. It has, indeed, been likened to his business autograph. The wrong for which a remedy is given consists in misrepresenting to the public, by the use of his trade-mark, goods or wares of another as having been made by the true owner of the mark, and thereby depriving him to a greater or less extent of the benefit of the good will of his establishment, and the reputation that he has given the articles made by him. Stokes v. Landgraff, 17 Barb. 608. It is essential that the symbol or device shall be adopted to distinguish the productions of the manufacturer or vendor from those of others, and it must so distinguish them. "The trade-mark must either by itself, or by association, point distinctly to the origin or ownership of the article to which it is applied." Canal Co. v. Clark, 13 Wall. 311. It must indicate, to those familiar with its use and purpose, by or for whom the article was made, produced, or prepared for sale. If such be not its purpose and meaning, it fails of being a legal trade-mark. The right to it cannot exist as a mere abstract right, independent of or disconnected from the business in which it is used. It is not property except as an incident to such business. It cannot be transferred, except with the business. Spring Co. v. Spring Co., 57 Barb. 526; Crucible Co. v. Guggenheim, 2 Brewst. 321; Lockwood v. Bostwick, 2 Daly, 521; Derringer v. Plate, 29 Cal. 292; McVeagh v. Cigar Factory, American Trade-mark Cases, 970. In this particular it resembles the good will of a business. One having acquired the right to a trade-mark in the business of manufacturing or preparing a particular article for sale may sell the trade-mark with the business, but not separate from it. Apply the foregoing definition and essentials of a legal trade-mark to the facts of this case, and it is apparent that the device in question cannot be a trade-mark, and the right to use, as such right is shown by the complaint, is not property, but a mere personal privilege; or, rather, the use of it on cigars is only an advertisement of the fact that the person using it is a member of one of the cigar makers' unions. Clearly, to indicate what person, firm, or corporation made the cigars in any box on which the mark is placed, is not the purpose of its adoption and use. Its purpose is only to indicate membership in the union. The complaint claims for the international and local unions the right to the trade-mark, and right to confer the privilege of using it on those they admit to membership, but it does not appear that they were ever, as unions, engaged in manufacture or trade, or that they were formed for any such purpose. The case comes just to this: The cigar-makers have formed themselves into associations, and, to secure to the members whatever benefit in their business the fact of membership may give them, they agree on a certain device to be placed on their productions as a sign of membership. We might suppose any other association of persons, a church, the order of Free Masons or Odd Fellows, to agree that its several members shall put a particular device on articles manufactured by them for sale, so that the members may mutually assist each other by means of such device. Now, the right to use such a device, being got merely by joining the association, and not depending at all on the person having earned a reputation or good will for the manufacture of the particular article, could not be regarded as a lawful trade-mark. Such a case would not materially differ from this. It is true the members of the unions are all engaged in the same kind of business, to-wit, the making of cigars. But they are not engaged in business together. The business and business interests of one are as distinct from those of another as though they followed entirely different kinds of business. In these particulars the device is wanting in the essential characteristics of a legal trade-mark: First. It is not adopted nor used to indicate by what person the articles were made, but merely to indicate membership of a certain association. Second. Its use is not enjoyed as an incident to any business, and the right to use it cannot be transferred, even with the transfer of the business in which it may have been employed; the right to use it can be acquired only by becoming a member of one of the unions or employing those who are members, and lost only by ceasing to be a member or to employ members. Third. There is no exclusiveness in the use, or right to use, which is necessary to a legal trade-mark. Browne, Trade-marks, §§ 143, 309, 324.

An interesting question as to the responsibility of a municipal corporation for damages caused by the firing of a cannon in a public park, was decided by the Supreme Court of Massachusetts in Lincoln v. City of Boston, 20 N. E. Rep. 329. There it was held that under the ordinance of the City of Boston providing that no cannon or artillery shall be fired by the militia or others upon the common or other public grounds, unless such firing is authorized by the city council, the mayor or the commander-in-chief of the militia of the commonwealth, a license to fire cannon on the common is not given by the city as an act of ownership, but as an act of municipal government, and the person doing the firing is not the city's agent, so as to make the city liable for damages caused by plaintiff's horse taking fright at the firing, and running away, on a neighboring street. The court says:

These considerations make plainer what is very plain without them, that the ordinance set out in the declaration is not the exercise of an owner's authority over his property, but is a police regulation of the use of a public place by the public, made by the city under its power to make needful and salutary by-laws, without regard to the accidental ownership of the fee, Stat. 1854, ch. 448, § 35; Com. v. Davis, 140 Mass. 485, 4 N. E. Rep. 577. See Com. v. Worcester, 3 Pick. 462; Pedrick v. Bailey, 12 Gray, 161; Com. v. Curtis, 9 Allen, 266; Com. v. Patch, 97 Mass. 221; Com. v. Brooks, 109 Mass. 355. Like the ordinance discussed in Com. v. Davis, its purpose is prohibitory, and the license which it implicitly authorizes, Rev. Ord. 1885, ch. 1, § 7 is merely a removal of the prohibition and of the liability to a penalty which otherwise would be incurred, Rev. Ord. 1885, ch. 1, § 5. It makes no difference whether the license is given by the mayor or by the commandor in chief of the militia, see Stat. 1887, ch. 411, §§ 90, 108, 109. In either case the license is not a permission granted by the agents of the owner, but an adjudication of an exception to a *quasi* statutory rule, made by a person who for that purpose is not the owner's agent. *A fortiori*, the person who fires the

cannon is not the city's agent or servant, and the firing is not the city's act. The case, then, is simply that the city has failed to prohibit the firing of cannon in a public park, by legislation, or has given its legislative sanction on certain conditions. It has no private interest in the matter, and there is no statute giving an action for such a cause, Clark v. Waltham, 128 Mass. 567, 570, and cases *supra*. See Hutchinson v. Concord, 41 Vt. 271, 274; Tindley v. Salem, 137 Mass. 171. Annoying, and even dangerous, as such firing may be, an adjoining householder could not maintain an action against the city, and the plaintiff stands no better than an adjoining owner would. We do not understand that he seeks to charge the city for a breach of its statutory duty with regard to highways. With regard to that, however, it may be, as to the duty of land owners, it would be enough to say that the act of the person who fired the cannon was the proximate, or at least a concurring cause; and that he was not a servant of the city, Kidder v. Dunstable, 7 Gray, 104; or, more shortly still, that noises outside the limits of the highway, amounting to a public nuisance, are not a statutory defect in the way, Hixon v. Lowell, 13 Gray, 59, 63; Keith v. Easton, 2 Allen, 552, 555; Bemis v. Arlington, 114 Mass. 507: Cook v. Montague, 115 Mass. 571.

Concerning the power of a stockholder in a corporation to enforce an inspection of the stock transfer book of the company, the Supreme Court of Rhode Island, in Lyon v. American Screw Co., 17 Atl. Rep. 61, says:

One of the privileges incident to ownership of stock in a corporation, is that of an inspection of the books and condition of the company. This privilege in general becomes a right when the inspection is sought at proper times and for proper purposes and in particular when it is specially given either by the law of the State or by the charter and by-laws of the company. * * * But the petitioners argue that the transfer of stock is a part of the business of the company, and that consequently the stock ledger is included within the operation of the by-law. We do not so understand it. An "account of all the business of the company" has reference to its manufacturing and commercial transactions. A list of stockholders would neither naturally nor properly be included in an account of the businesss. Hence a book containing the names of the stockholders is not, in our opinion, within the provisions of the by-law. There is nothing in the charter nor in the statutes relating to this matter. If, then, the petitioners have not an express and absolute right to examine this book, but only what may be termed a privilege so to do, incident to ownership of stock, the question comes, under what circumstances may this privilege be enforced as a right? The answer has already been given—at proper times, and for proper purposes. One reason for this limitation is that a stockholder should not be entitled to call upon the court to enforce that which is not given him by law, or the rule of the company, unless the circumstances show that he needs such aid for some reasonable and proper purpose. While all the privileges of a stockholder should be fully accorded to him when occasion requires, the affairs of the company should not be interfered with without such requisite occasion. People v. R. R. Co., 11 Hun, 1; *In re* Sage, 70 N. Y. 220; Com. v. Insurance Co., 105 Pa. St. 111. We think it is well settled that in cases like the one before us it is discretionary with the court whether to issue a writ of *mandamus* or not; and that this discretion depends upon the necessity or propriety of granting it, under the circumstances shown. In the following cases it was denied because the facts did not show that it was necessary for the particular occasion. The King v. Merchant Tailors' Co., 2 Barn. & Adol. 115; Reg. v. Mariquita Mining Co., 1 El. & El. 289; People v. Railroad Co., 50 N. Y. Super. Ct. 456; Rosenfeld v. Einstein, 46 N. J. Law, 479; People v. Railroad Co., *supra*; Hatch v. Bank, 1 Rob. (La.) 470. In the following cases it was granted expressly upon the showing of a proper cause or of a right given: *In re* Burton & Sadlers Co., 31 Law J. Q. B. 62; People v. Steam Ship Co., 50 Barb. 280; Cockburn v. Bank, 13 La. Ann. 289. * * * We have therefore to consider whether the case now made is such as to call for the issuing of the writ. The petition is urged upon the ground that the stock has of late paid little or no dividends, and has depreciated very much in market value. But it is not alleged that this is due to any mismanagement of the company, or that it has been able to pay dividends, or that the books would disclose a value for the stock above its market value, if this would be material. For all that appears, the lack of dividends and the decline of the stock may be due simply to the ordinary competition and vicissitudes of business. In any event, no question is made of the right of the petitioners to fully inform themselves from the books of the company as to its financial condition. Also, that the officers of the company do not print and distribute among its stockholders any reports as to its business or condition, and they desire to inform themselves upon these matters. Excepting printing, this allegation is not supported by the testimony; on the contrary, it appears that copies of the treasurer's reports to the annual meetings have always been furnished to any stockholder asking for them. Also, that they desire to confer with their fellow-stockholders, and for this purpose to inspect the list. The by-laws provide both for annual and special meetings, which were, doubtless, deemed to afford ample opportunity for conference about the affairs of the company, as well as the fit occasion for it. It does not appear that the petitioners have been deprived of such conference at any annual meeting, or that they have tried to call a special meeting. Certainly outside talk among stockholders could amount to nothing unless it were to be followed by action at a corporate meeting. Neither do they allege that there is any considerable dissatisfaction among the stockholders, such as to render such a conference advisable or important. Indeed, the fact that one of the petitioners has advertised, from time to time, for nearly a year, for stockholders to send him their names and addresses for this purpose, without success, tends to show that there is no such dissatisfaction, and that the desire for a conference is not reciprocal. We fail to see, therefore, how the petitioners would be benefited by a writ of *mandamus*, or injured by its refusal.

THE RECENT LAW OF GIFTS

Gift in General.—A gift, as the ordinary view of the transaction is embodied in statutory phraseology, is a transfer of personal property, made voluntarily and without consideration.[1] A gift in view of death, commonly called a *donatio causa mortis*, has received statutory definition as one which is made in contemplation, fear or peril of death, and with intent that it shall take effect only in case of the death of the giver.[2] Where an absolute gift is made, a reservation of the right to use, in the nature of a condition subsequent, will not invalidate the gift.[3]

Consummation of Transfer.—To constitute a valid gift the transfer must be consummated, and not remain inchoate, or rest in mere intention; and this is so, whether the gift is by delivery only, or by the creation of a trust in a third person, or in the donor; for enough must be done to pass the title.[4] Accordingly it has been held, in a ruling of comparatively recent date, that a vote by the trustees of a charity, created by will, that the note of a possible beneficiary given them as security for money loaned him out of the fund, shoud "be surrendered to him, he having paid the interest punctually, and the trustees being satisfied that he will make good use of the money in the future," does not constitute an immediate gift of the note.[5] So on the principle that a gift is not consummated without delivery, and that the subject of it must therefore be *in esse*, it has rather lately been ruled that a trustee cannot make a gift to his wife of what may become payable to the family in the future for board, as he could not give that which he had not yet acquired.[6] A *donatio causa mortis* must be completed executed, precisely as required in the case of a gift *inter vivos*, subject to be divested by the happening of any of the conditions subsequent; that is, upon actual revocation of the donor, or by the doner's surviving the apprehended peril, or outliving the donee, or by the occurrence of a deficiency of assets to pay the debts of the deceased donor.[7]

Delivery.—Absolute delivery is uniformly insisted upon,[8] and it is said that "there must be delivery of possession; and that the thing must be put into the hands of the donee, or

[1] Cal. Civ. Code, § 1147. It has also been defined to be the act by which the owner of a thing voluntarily transfers the title and possesion of the same from himself to another person who accepts it without any consideration: 1 Bouv. L. Dict. tit. Gift. It is said by our chief legal commentator that gifts or grants, which are alike methods of transferring personal property, are thus to be distinguished from each other, that gifts are always gratuitous, grants are upon some consideration or equivalent: 2 Bl. Com. 440. On distinction between sale and gift, see Newmark on Sales, § 10; Parkinson v. State, 14 Md. 184; 74 Am. Dec. 522, 531.

[2] Cal. Civ. Code, § 1149. See also 1 Pars. Cont. 236. "Cases of donations *causa mortis* are exceptions not to be extended by way of analogy: Healy v. Kirby, 18 Pa. St. 326; cited in 1 Am. L. Reg. 25, and quoted in Gano v. Fisk, 43 Ohio St. 462, 3 N. E. Rep. 532, 536, where it is further said (at p. 534), "Gifts *causa mortis* are not favored, and such gifts must be clearly proved. The civil law sought to prevent fraud in such gifts, and required their execution in the presence of five witnesses to render them valid. Great strictness and clear proof to establish such gifts have been required by the English courts, and litigation as to them has been extensive and hostile. Such a gift can be upheld only where the intention of the donor is definite and certain, and such intent is expressed as to a proper matter of such gift, and such gift is executed."

[3] Bennett v. Cook, reported in full, 27 Cent. L. J. 90.

[4] Martin v. Funk, 75 N. Y. 134; as quoted in Gano v. Fisk, 43 Ohio St. 462, 3 N. E. Rep. 532, 535, 536. The delivery must be as perfect and complete as the nature of the thing given will admit of: Gano v. Fisk, just cited, relying on Pars. Cont. *526, and cases cited, and on 3 Wait Act. & Def. 505.

[5] Hayden v. Hayden, 8 N. E. Rep. Mass. 437, 440, holding that in order to give him an immediate right to the money, there must have been not only an intention to make a present gift to him, but enough must have been done in execution of such intention to make the gift complete; and citing Scott v. Berkshire Co. Sav. Bank, 140 Mass. 157, 166; 2 N. E. Rep. 925; Sherman v. New Bedford Sav. Bank, 138 Mass. 581; Ide v. Pierce, 134 Mass. 262; Gerrish v. New Bedford Sav. Bank, 128 Mass. 159; Cummmings v. Bramhall, 120 Mass. 552, 564; Shurtliff v. Francis, 118 Mass. 154; Clark v. Clark, 108 Mass. 522; Brabrook v. Five Cents Sav. Bank, 104 Mass. 228.

[6] Read v. Rahn, 65 Cal. 343; 4 Pac. Rep. 111, 112.

[7] Kaskett v. Hassel, 2 S. C. Rep. 415, as stated in note to Gano v. Fish, 3 N. E. Rep. 536. If the gift does not take effect as an executed and complete transfer to the donee of possession and title either legal or equitable, it is a testamentary disposition, good only if made and proved as a will: *Ibid.* Gifts *causa mortis* are of a mixed nature resembling gifts *inter vivos* in the essential requisite of delivery, and resembling legacies in being subjects to the debts of the deceased, and in being ambulatory or revocable and contingent on death: Bloomer v. Bloomer, 2 Bradb. Surr. 340; quoted in Gano v. Fisk, 43 Ohio St. 462; 3 N. E. Rep. 532, 535, where the subject is further elaborated and reference is also made to Rhodes v. Childs, 64 Pa. St. 18; Roper Legacies 2; 3 Redf. Wills, § 2, and cases cited.

[8] Note to Gano v. Fisk, 3 N. E. Rep. 537, referring to Chase v. Redding, 13 Gray, 418; Lessions v. Mosely, 4 Cush. 87; Bates v. Kempton, 7 Gray, 382; Parish v. Stone, 14 Pick. 203; Grover v. Grover, 24 Pick. 261; Brown v. Brown, 18 Conn. 410; Camp's Appeal, 36 Conn. 88.

placed within his power to deliver the means of obtaining it;"[9] while it is pointed out that without delivery the transaction is not valid as an executed gift; and without consideration, it is not valid as a contract to be executed.[10] Thus, to establish a gift *causa mortis*, the common law requires clear and unmistakable proof, not only of an intention to give, but of an actual gift perfected by as complete a delivery as the nature of the property will admit of.[11] It has further been quite lately laid down, as made clear by a review of the decisions concerning the nature and effect of a delivery of a chose in action, that the instrument or document must be the evidence of a subsisting obligation, and be delivered to the donee so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift *inter vivos*, but upon the recognized conditions subsequent, in case of a gift *mortis causa;* and that a delivery which does not confer upon the donee the present right to reduce the fund into possession, by enforcing the obligation according to its terms, will not suffice.[12] But though to constitute a legal parol gift of chattels there must be actual or constructive delivery, so as to confer the right of enjoyment *in præsenti*, yet the fact that the chattels were in the donee's possession at the time of the death of the donor, with whom the donee was living, may be considered, according to an important decision of recent rendition, as showing that there was no occasion to make a visible transfer of possession.[13]

Savings Bank Deposits.—It has somewhat recently been held that to constitute a gift of money deposited in a savings bank in the name of the party claiming it as a gift, it must have been put in the name of the alleged donee with the intention, on the part of the donor, of making a gift of it, and it must have been accepted by the donee.[14] Yet a delivery to a donee of a savings bank book, containing entries of deposits to the credit of the donor, with the intention to give to the donor the deposits represented by the book, is a good delivery to constitute a complete gift of such deposits, on the general ground that a delivery of a chose in action which would be sufficient to vest an equitable title in a purchaser is a sufficient delivery to constitute a valid gift of such chose in action.[15] The delivery of a bank book by the donor in her last illness, saying that if she died the money should go to her sister in Ireland, has very recently been held not a complete *donatio causa mortis*.[16]

Checks and Certificates of Deposit.—It is said that the gift of an unaccepted check, not being in itself an equitable assignment of the fund, is not a sufficient gift[17] even when accompanied by the pass book of the donor;[18] but if the banker accept the check, prior to the death of the donor, the gift is complete and valid.[19] The delivery of a certificate of deposit may constitute a valid gift *donatio*

[9] Harris v. Clark, 3 N. Y. 93. The gift of the maker's own note is the delivery of a promise only, and not of the thing promised, and upon the death of the maker, leaving the promise unfulfilled, the gift fails: Starr v. Starr, 9 Ohio St. 74.

[10] Harris v. Clark, 3 N. Y. 93, as quoted in note to Gano v. Fish, 3 N. E. Rep. 537.

[11] Hatch v. Atkinson, 56 Me. 324, as quoted in Gano v. Fisk, 43 Ohio St. 462; 3 N. E. Rep. 532, 546.

[12] Basket v. Hassell, 2 S. C. Rep. 415. A delivery, in terms, which confers upon the donee power to control the fund after the death of the donor, when, by the instrument itself, it is presently payable, is testamentary in character, and not good as a gift: Note to Gano v. Fisk, 3 N. E. Rep. 537, referring to Powell v. Hellicar, 26 Beav. 261; Reddell v. Dubree, 10 Sim. 244; Farquharson v. Carver, 2 Colly. 356; Hatch v. Atkinson, 56 Me. 324; Bimm v. Markham, 7 Taunt. 224; Coleman v. Parker, 114 Mass. 330; Wing v. Merchant, 57 Me. 383; McWillie v. Van Vacter, 35 Miss. 428; Egerton v. Egerton, 17 N. J. Eq. 420; Michener v. Dale, 23 Pa. St. 59.

[13] Bennett v. Cook (S. C.), reported in full, 27 Cent. L. J. 90, with note, 92.

[14] Scott v. Ford (Mass.), 2 N. E. Rep. 925. See Newmark on Bank Deposits, § 152.

[15] Camp's Appeal, 36 Conn. 88; 4 Am. Rep. 39. See Hewitt v. Kaye, L. R. 6 Eq. 198; Amis v. Witt, 33 Beav. 619. The court held that the book itself is a document of title, the delivery of which, with that intent, is an equitable assignment of the fund. See Pierce v. Boston Savings Bank, 129 Mass. 425; Hill v. Stevenson, 63 Me. 364; Tillinghast v. Wheaton, 8 R. I. 536. A contrary doctrine has been held in Ashbrook v. Ryan, 2 Bush, 228, and in McConnell v. Murray, 3 Ir. Eq. 460. These statements of the purport of the cases are made in the note to Gano v. Fisk, 3 N. E. Rep. 537. See also Newmark on Bank Deposits, § 149.

[16] Appeal of Walsh (Pa), 15 Atl. Rep. 470, as noted, 27 Cent. L. J. 511.

[17] Second Nat. Bank of Detroit v. Williams, 13 Mich. 282; Bank of Republic v. Millard, 10 Wall. 152.

[18] *In re* Beak's Estate, L. R. 13 Eq. 489.

[19] Bromley v. Brunton, L. R. 6 Eq. 275; note to Gano v. Fisk, 3 N. E. Rep. 537; Newmark on Bank Deposits, § 207. Where the drawer of a check delivered it to the payee, intending thereby to give to the payee the fund on which the check was drawn, it was held that until the check was either paid or accepted, the gift was incomplete, and that in the absence of such payment or acceptance, the death of the drawer oper-

causa mortis;[20] but the delivery must be such as to confer upon the donee the right to reduce the fund to possession; and where the donor annexes a condition precedent, which must happen before it becomes a gift, and the contingency contemplates is the donor's death, this gift cannot be executed in the donor's life-time, and consequently can never take effect.[21]

Evidence of Gift.—Where one party deposited a sum in bank to the credit of another, who testified that before the death of the depositor he had said that that money was hers, it was held within a recent period, that her evidence, if believed, was sufficient to establish a gift.[22]

Declarations of Donor.—Where there has been plenary proof of a gift it is not error, according to a late ruling of the courts in an action by the administrator of the donor against the donee, to exclude declarations of the donor tending to controvert the gift.[23]

Testamentary Gift.—A testamentary gift by a husband to his wife is superior to all legacies not specially preferred to it by the will.[24]

Gift by way of Payment of Incumbrances.—When a decedent by parol agreed with his niece and her husband, that he would pay off certain incumbrances on their farm, they giving him a deed to it, and that after all the payments were made he would convey the land back to her, it was very lately held that the evidence showed that he held the land upon a constructive trust, that the payments he had made were a gift to the niece and that she was entitled to claim a deed to the land.[25]

Adverse Possession.—Where the donee understood the gift to him to be absolute, and accordingly took possession and held adversely to the donor for twenty-one years, his title is valid, according to a very recent ruling, although the donor may have understood the matter differently.[26]

Undue Influence.—Where a father, eighty years old and feeble, shortly before death acknowledges deeds to a son, with whom he has been living, and on a bill by the other heirs to set them aside, there is evidence that the father was mentally incompetent, the son has the burden to show fairness and absence of undue influence.[27]

ated, as against the payee as a revocation of the check: Simmons v. Sav. Soc., 31 Ohio St. 457.

[20] Westerlo v. DeWitt, 36 N. Y. 340; Amis v. Witt, 33 Beav. 619; Moore v. Moore, L. R. 18 Eq. 474; Hewitt v. Kaye, L. R. 6 Eq. 198.

[21] Basket v. Hassell, 2 S. C. Rep. 415; note to Gano v. Fish, 3 N. E. Rep. 537.

[22] Alger v. North, etc. Co. (Mass.), 15 N. E. Rep. 916, as noted, 26 Cent. L. J. 585.

[23] Bennett v. Cook (S. C.), reported in full in 27 Cent. L. J. 90. But in an action on a note by the payee against the maker, it has very lately been held that when declarations of the payee of an intention to present the maker with the note have been admitted, other declarations of the maker just prior thereto, that he intended to collect the note by legal means are admissible. Sherman v. Sherman (Iowa), 39 N. W. Rep. 232, as noted, 27 Cent. L. J. 438.

[24] Moore v. Alden (Me.), 14 Atl. Rep. 199, as noted in 27 Cent. L. J. 155.

[25] White v. Cannon (Ill.), 17 N. E. Rep. 453, as noted in 27 Cent. L. J. 275.

[26] Moreland v. Moreland (Pa.), 15 Atl. Rep. 655, as noted in 27 Cent. L. J. 560. Of similar scope is another ruling of almost as recent date, that when a party has been in possession of land under a parol gift from the owner for more than twenty years, and is sued by the owner or his representative, it is error for the court to direct a verdict for the demandant: Wheeler v. Laird (Mass.), 18 N. E. Rep. 212, as noted, 27 Cent. L. J. 583.

[27] Collins v. Collins (N. J.), 15 Atl. Rep. 349, as noted in 28 Cent. L. J. 97.

CORPORATIONS—STOCK-CERTIFICATES—NEGOTIABILITY.

EAST BIRMINGHAM LAND CO. V. DENNIS.

Supreme Court of Alabama, January 15, 1889.

A certificate of stock in a private corporation is not a negotiable instrument, and the owner of such a certificate, which was lost by him, or stolen from him, without fault on his part, can assert his title thereto against one, who subsequently became an innocent purchaser thereof for value.

The bill in this case was filed by J. F. Dennis against J. P. Mudd, and the East Birmingham Land Company, a private corporation, and sought to compel the transfer, on the books of the corporation, of a certificate for ten shares of stock, of which the complainant claimed to be the owner, and to compel the delivery of the certificate to him by said Mudd, who had the possession of said certificate, and claimed the ownership of it. The certificate was issued in the name of A. R. Dearborn, and was indorsed by him in blank. The complainant claimed that he had bought the certificate, with the blank indorsement thereon, from a holder who had acquired it by purchase from said Dearborn; and that it was lost by him, or stolen from him, without fault on his part. Mudd purchased the certificate for value from Wilson, Sage & Clark, stock-brokers in Birmingham; and,

while denying complainant's ownership, claimed that he acquired a good title by the custom and usage of brokers and merchants in Birminham. A decree *pro confesso* was taken against the corporation. On final hearing on pleadings and proof, the court rendered a decree for the complainant, and this decree is now assigned as error by each of the defendants separately.

SOMERVILLE, J., delivered the opinion of the court:

We concur in the conclusion reached by the judge of the city court, that the appellee, Dennis, complainant in the bill, is the owner of the ten shares of stock which are the subject of litigation in the present suit. The testimony satisfactorily proves that the certificate of stock, indorsed in blank by Dearborn, who was the owner on the books of the defendant corporation, was the property of the appellee, and was taken or stolen from his possession without any negligence on his part whatever, several months before it was purchased by the defendant Mudd, who innocently bought and paid value for it some time in March, 1888. The only question is whether Mudd, who paid full value for this stock, without notice of the complainant's claim to it, acquired a title superior to that of complainant. The established rule is that no person can ordinarily be deprived of his ownership of property save by his own consent or his negligence. The only exception to this rule is the case of a *bona fide* purchaser for value of negotiable paper. We have no reference, of course, to the taking of property for public uses by judicial condemnation, which may be done without the owner's consent.

It cannot be contended, with any degree of plausibility, that, under the facts of this case, the complainant was guilty of negligence or the want of ordinary care in the custody of the certificate. He kept it in a box in the vault of a banking house, whence it was abstraced by some unknown person, apparently without any fault on his part. Nor does any question arise involving the rights of a subsequent *bona fide* purchaser of stock from one shown to be the owner on the corporate books, who has already made a prior unregistered transfer of it to another purchaser. All such transfers made by the true owner, and not registered on the books of the corporation within fifteen days, are declared by statute to be "void as to *bona fide* creditors or purchasers without notice." Code 1886, § 1671, Fisher v. Jones, 82 Ala. 117, 3 South. Rep. 13. If the defendant Mudd had claimed by a subsequent purchase from Dearborn, the owner of the stock on the corporate books, this question would arise. But he does not so claim, his title being derived through the complainant, Dennis, himself, by two or more intermediate transferees, the first of whom was a fraudulent holder without title.

Whether Mudd's title to the stock, therefore, is superior to that of Dennis, depends on whether a certificate of stock, indorsed in blank by the owner, is to be treated as negotiable paper. The rule is well settled that a *bona fide* purchaser of a negotiable bill, bond, or note, although he buys from a thief, acquires a good title, if he pays value for it, without notice of the infirmity of his vendor's title.

The authorities are clear in support of the view that a certificate of corporate shares of stock, in the ordinary form, is not negotiable paper; and that a purchaser of such certificate, although indorsed in blank by the owner, where no question arises under the registration laws, obtains no better title to the stock than his vendor had, in the absence of all negligence on the part of the owner, or his authority to make the sale.

This question arose and was decided by the New York Court of Appeals in Bank v. Railroad Co. (1856), 13 N. Y. 599. It was there held that such a certificate does not partake of the character of a negotiable instrument, and that a *bona fide* assignee, with full power to transfer the stock, takes the certificate subject to the equities which existed against his assignor. Such certificates, said Comstock, J., "contain no words of negotiability. They declare simply that the person named is entitled to certain shares of stock. They do not, like negotiable instruments, run to the bearer or order of the party to whom they are given." They were said to be in some respects like a bill of lading or warehouse receipt, being "the representation of property existing under certain conditions, and the documentary evidence of title thereto." The most that can be said is that all such instruments possess a sort of *quasi* negotiability, dependent on the custom of merchants and the convenience of trade. They are not, in the matter of transferability, protected strictly as negotiable paper.

In Shaw v. Spencer, 100 Mass. 382, it was also decided that a certificate of corporate stock, transferred in blank on its back, was clearly not a negotiable instrument. "No commercial usage," it was said, "could give to such an instrument the attribute of negotiability. However many intermediate hands it may pass through, whoever would obtain a new certificate in his own name must fill out the blanks * * * so as to derive title to himself directly from the last recorded stockholder, who is the only recognized and legal owner of the shares." The case of Sewall v. Water-Power Co., 4 Allen, 282; decided by the same court a few years before, is referred to as a precedent in support of this conclusion.

The precise point in the present case was also decided in Barstow v. Mining Co., 64 Cal. 388, 1 Pac. Rep. 349, where it was expressly held that *bona fide* purchaser of stock standing on the company's books in the name of the former owner, regularly indorsed by him, and stolen from the present owner without his fault, gets no title. The decision was based on the fact that such certificates are not negotiable instruments, but simply muniments of title, and evidences of the holder's right to a given share in the property and franchises of the corporation. It was observed, in

regard to the matter of negligence, as follows: "But if the purchaser from one who has not the title, and has no authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit."

The same principle was applied to bills of lading in Gurney v. Behrend, 3 El. & Bl. 622, decided by the English queen's bench, where an instrument of that kind, indorsed in blank by the consignor, and sent by him to his correspondent, had been misappropriated. The correspondent, without authority, fraudulently transferred the bill for value, and it was held by Lord Campbell that, for the want of the element of negotiability in the paper, the title to the goods was unaffected by the transaction.

The doctrine of Barstow v. Mining Co., *supra*, is well supported by authority, and, in our judgment, announces a correct principle of law, and we fully approve it. Woolley v. Sergeant, 14 Am. Dec. note, p. 427, and cases there cited; Cook, Stocks, §§ 7, 10, 192, 368, 437, 2 Daniel, Neg. Inst. (3d ed.) § 1708*g*. It harmonizes entirely with the declaration of our statute that shares of stock in private corporations are "personal property, transferable on the books of the corporation" in accordance with the rules and regulations of the corporation. Code 1886, § 1669; Campbell v. Iron Co., 83 Ala. 451, 3 South. Rep. 369.

There is a class of cases, not to be confounded with the one in hand, where the holder of such a certificate of stock, indorsed in blank, is clothed with power as agent or trustee to deal with such stock to a limited extent, and transfers it by exceeding his powers, or in breach of his trust. In such cases it has often been held that the true owner, having conferred on the holder by contract all the external *indicia* of title, and an apparently unlimited power of disposition over the stock, "is estopped to assert his title as against a third person, who, acting in good faith, acquires it for value from the apparent owner." 2 Daniel, Neg. Inst. (3d ed.) § 1708*g*; McNeil v. Bank, 46 N. Y. 325; Turnpike Co. v. Ferree, 17 N. J. Eq. 117; Prall v. Tilt, 28 N. J. Eq. 479; Bank v. Livingston, 74 N. Y. 223. These cases rest on the principle that it is more just and reasonable, where one of two innocent parties must suffer loss, that he should be the loser who has put trust and confidence in the deceiver than a stranger who has been negligent in trusting no one. Allen v. Maury, 66 Ala. 10.

It being an established principle of law that certificates of stock are not to be regarded as negotiable paper, it is not permissible to prove a custom or usage among stock brokers to the contrary. No usage is good which conflicts with an established principle of law, any more than one which contravenes or nullifies the express stipulations of a contract. Dickinson v. Gay, 83 Am. Dec. 656, note 664; Railroad Co. v. Johnston, 75 Ala. 596; Lehman v. Marshall, 47 Ala. 362.

The decree of the court below is in accordance with these views, and must be affirmed.

NOTE.—There has been a constant effort on the part of stock-brokers to have certificates of shares in private corporations declared negotiable instruments, but the courts have uniformly decided that they are not negotiable,[1] though they are often spoken of as *quasi* negotiable. Therefore, the general rule, that a party cannot be deprived of his property without his consent or by due process of law, applies to such certificates. The officers of the corporation are the custodians of its stock-books, and it is their duty to see that all the transfers of stock are made by the stockholders themselves or by persons having authority from them. If they are in doubt, they may require proper proof before making a transfer, but in any case they must act on their own responsibility. The great principle is that the owner cannot be deprived of his property without his consent or by due process of law.[2] The corporation must exercise reasonable care. If it learns from the form of the certificate or otherwise, that the present holder thereof is not the absolute owner, and it fails to make inquiries, and issues a new certificate, and the rightful owner is injured thereby, the corporation is liable to him, without proof of fraud or collusion.[3] When the company issues a new certificate, the power of attorney on the old certificate having been forged, the company is liable to the true owner.[4] Though the cases are not numerous, yet the decision of the principal case is sustained by the authorities.[5]

Exceptions to Rule.—This rule applies when the owner was not negligent and did not put it in the power of another to mislead a third party, and the purchaser himself had no reason to doubt the title of his vendor. When the owner delivers the certificate to another with an executed power of attorney thereon to transfer the same, an innocent purchaser for value will be protected against the owner's claim thereto, though such vendor had no authority to sell, or otherwise disobeyed the owner's instructions.[6] If, however, the purchaser knew that the holder was merely acting as attorney for another, the owner is not bound beyond the power given to his attorney.[7] So, when the purchaser knew that the holder held the certificate in a fiduciary character, he was not protected when he took it to secure a debt growing out of another transaction.[8] Where the vendor was a boy of only sixteen years of age, it was held that the vendee was not a *bona fide* purchaser.[9] Where the owner, who had executed a blank power of attorney to transfer his stock on his certificate, lost the same, it was held that he was not guilty of such culpable carelessness as to lose his title as against a *bona fide* purchaser for value.[10] In Illinois it was held, that one who lost a

[1] Cook on Stock & Stockholders, § 412.

[2] Telegraph Co. v. Davenport, 97 U. S. 369.

[3] Loring v. Salisbury Mills, 125 Mass. 138.

[4] Pratt v. Boston, etc. R. Co., 126 Mass. 443; Telegraph Co. v. Davenport, *supra*.

[5] Pratt v. Taunton Copper Co., 123 Mass. 110; Bereich v. Marye, 9 Nev. 312; Burton's Appeal, 93 Pa. St. 214; Dos Passos on Stockbrokers, 611; Barstow v. Min. Co., 64 Cal. 388.

[6] Mount Holly, etc. Co. v. Ferree, 17 N. J. Eq. 117; Weaver v. Barden, 49 N. Y. 286; Walker v. Detroit, etc. R. Co. 47 Mich. 338; McNeil v. Tenth Nat. Bank, 46 N. Y. 325.

[7] Prall v. Tilt, 28 N. J. Eq. 479.

[8] Anderson v. Nicholas, 28 N. Y. 600.

[9] Biddle v. Bayard, 13 Pa. St. 150; Sherwood v. Meadow V. M. Co., 50 Cal. 412.

bond, which by statute was a negotiable instrument, was guilty of such negligence that he could not assert his title thereto against a *bona fide* purchaser for value, though for lack of his indorsement thereon such purchaser had obtained only the equitable title thereto.[11]

Remedies.—After the certificate has been surrendered and a new certificate obtained, which has passed into the hands of a *bona fide* purchaser for value, the title of the latter is good against every person;[12] however the corporation is still liable to the true owner, and must pay him damages or go into the market and purchase other shares for him.[13]

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[11] Garvin v Wiswell, 83 Ill. 215.

[12] Machinists' N. B. v. Field, 126 Mass. 345; Mandlebaum v. North A. M. Co., 4 Mich. 465; Pratt v. Taunton C. M. Co., *supra.*

[13] Cook on Stock & Stockholders, § 365.

JETSAM AND FLOTSAM.

JUDGE THAYER, of the United States District Court, at St. Louis, has handed down an interesting decision in the case of the United States against Charles Gross, charged with stealing newspapers from the top of a letter box. Judge Thayer decides that the taking of a package of papers from the top of a letter box is no offense against the mail laws. The top of a mail box is not a receptacle for the mail, and a package placed there is no more in the custody of the mail than a package placed upon the steps of the post office.

THE Minnesota statute, requiring the upper berth in sleeping cars to be closed unless actually occupied, has been adjudged invalid in a decision at *nisi prius* in the case of the appeal of the Minneapolis & St. Louis R. Co. from the order of the Commission putting in force the law. The court holds that a person may purchase a berth or a whole section in a car and occupy it, but if he purchases one berth only he is not entitled to the whole section, and it is evident that lowering the upper berth, even if not occupied, will not cause the occupant of the lower berth any more discomfort than if it were occupied. The Commission have carried the case to the Supreme Court.

EX-MINISTER PHELPS, in an address recently delivered before the Glasgow Juridical Society, is reported to have made the following remarks on lawyers as speech-makers:

"Time was when the lawyers were esteemed to be pre-eminently the speech-makers. But they have been, in latter days, so far surpassed in that accomplishment by other classes in society, that they are no longer entitled to this questionable distinction. Lawyers are not much addicted to gratuitous oratory. They are seldom heard from until they are retained; nor then, unless there is an issue formed which it is necessary to discuss. Their argument must be confined to the matter in hand, and must cease when the discussion is exhausted or the question determined. They do not enjoy the latitude allowed to the lawyer described by the Roman satirist, whose client was heard complaining 'that his lawsuit concerned three little kids, while his advocate, in large disdain of these was thundering in forum over the perjuries of Hannibal and the slaughter of Cannæ.' The limits of forensic discourse are grave impediments to the cultivation of eloquence, which, in its modern state, needs to be unembarrassed by facts, unrestrained by occasion, and unlimited by time. So the Bar has fallen into what might be called, in comparison with discussions elsewhere, a measurable silence."

SECTION 3 of an ordinance of the City of Concordia, Kansas, intended to protect people from injury by the use of bicycles, tricycles, dog and goat carts, etc., reads as follows: "Any person who shall wilfully frighten any team, single horse or mule, and damage results to single horse, mule, or any person therefrom, with a baby carriage, shall be liable as in the next section provided." A subscriber in that city writes us inquiring:

"Can you tell us, from inclosed ordinance, whether if a mule with a baby carriage should become scared, with the result of causing damage to said baby carriage, the person scaring said mule would be liable? If not, who would be liable?"

We are inclined to think that the framer of the ordinance and the mule are equally liable, though the former might be allowed to plead ignorance of law (and language, too), which the mule could not do.

RECENT PUBLICATIONS.

THE LAW OF EXECUTORS AND ADMINISTRATORS. By James Schouler. Second Edition. Boston: Charles C. Soule. 1889.

This is the second edition of a book which appeared but a few years ago, and from this circumstance and the well established reputation of the author, who has written nothing but what is meritorious, we feel that an extended notice of this work is not necessary. It has the advantage of being the only prominent work on a subject wherein there is, to the practitioner, much vexation and a great deal of conflicting authority, attributable, doubtless, to the fact that much of it is statutory. The book treats of the appointment and qualification of executors and administrators, probate of the will, bonds of executors and administrators, the revocation of letters and new appointment, foreign and ancillary appointments, of the assets and the inventory; of the powers, duties and liabilities of executors and administrators as to personal assets and their collection, care, custody and management; power to sell, transfer and purchase; of payments and distribution; of allowance, legacies, etc., and of the powers, duties and liabilities of executors and administrators as to real estate. It contains over seven hundred pages and is well indexed. The notes are copious and extensive and bear evidence of much research. The book is beautifully printed and is in every respect first-class.

THE CONCURRENT JURISDICTION OF THE FEDERAL AND STATE COURTS, by George C. Holt, of the New York Bar. New York: Baker, Voorhis & Co., Law Publishers, 66 Nassau Street. 1888.

As the author says, the subject of this book is novel. There are books on the jurisdiction of the Federal Courts and on that of the State Courts, but none on their concurrent jurisdiction, although the subject is treated incidentally in various places. It often becomes a nice question with an attorney as to what forum he will select for the bringing of his suit, where he has a choice in the matter, and it is often difficult to determine whether he has such a choice. To assist him in such determination is the object of this work. It treats of the concurrent jurisdiction of the United States Supreme Court, of the concurrent jurisdiction of the

United States Circuit and District Courts with each other and with the State courts; of the grounds of preference between United States Circuit and District Courts and State courts; of the grounds of preference between United States Circuit Courts and State courts, growing out of diversity of procedure, and of the grounds of preference between United States Circuit Courts and State courts, growing out of diversity of decisions. From this statement it will readily be seen that the book has a scope beyond that which the title page discloses. It contains 237 pages, well printed and thoroughly indexed, and will, no doubt, be found a valuable addition to the many works on Federal and State jurisdiction.

A DICTIONARY OF LAW, consisting of Judicial Definitions and Explanations of Words, Phrases, and Maxims, and an Exposition of the Principles of Law: Comprising a Dictionary and Compendium of American and English Jurisprudence. By Wm. C. Anderson, of Pennsylvania Bar. Chicago: T. H. Flood & Company, Law Publishers. 1889.

We confess ourselves at a loss to know what to say about this book. It contains 1132 large pages of fine print, and like all books of its kind, does not offer much inducement for steady, connected reading. We have, therefore, denied ourselves the pleasure of studying it entire and have simply glanced through the book with a view of determining its character and scope. Bouvier's Law Dictionary has so long been in use and is so universally and favorably known, that it will, perhaps, be somewhat difficult to supplant it. But there are obvious reasons why a more modern work, thoroughly prepared and having in view questions of law incident to the growth and development of the country and its people, will be found valuable. In this regard we are inclined to think that the author has done his work conscientiously and well. For instance, the definition and discussion of the subjects of "Trusts," "Oleomargerine," "Inter-State Commerce" and "Telephones," all of recent interest are full and complete. The author claims for his work many advantages over similar productions heretofore issued, the most important of which is quotations from judicial decisions, illustrating the decisions. The endeavor seems to have been to find definitions framed by the courts instead of the text writers. The printing and binding of the work is first-class, and we have no doubt the profession will find it useful and valuable.

HUMORS OF THE LAW.

CONSIDERABLE noise prevailed in the court-house in Tralee, and the Chief Baron observed that the sheriff, instead of preserving order, was intently reading a book. At last, when the uproar was intolerable, the Chief Baron exclaimed: "Mr. Sheriff, if you allow this noise to go on, you'll never be able to finish your novel in quiet."

THE larceny of a pair of trousers by a boy being fully proved, despite the character for honesty which was produced, the Chief Baron's charge was brief: "Gentlemen of the jury, you have heard the prisoner is an honest boy, but he stole the breeches."

A VERY clear case of highway robbery being proved, and a verdict of "not guilty" returned, the angry Chief Baron asked: "Is there any other charge against this honest man?" On being told that there was not, the Chief Baron said: "Mr. Gaoler, as I'm leaving Tralee on my way to Cork to-day, don't discharge this man until I have half an hour's start of him on the road.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMINISTRATOR—Revival. —— Where an administrator obtains a judgment, and after the estate has been fully settled and the debts paid, dies pending *scire facias* sued out by him on the judgment, the proceedings therein may be revived in the names of the distributees.—*Crane v. Crane*, Ark., 11 S. W. Rep. 1.

2. APPEAL—Transcript — Filing Nunc Pro Tunc. —— Where P perfected an appeal to the supreme court from a circuit court, but failed to file his transcript as provided by the Code: *Held*, that the court had no jurisdiction to grant an order allowing the transcript to be filed *nunc pro tunc*, whatever the reasons may have been occasioning the neglect. — *Kelley v. Pike*, Oreg., 20 Pac. Rep. 685.

3. APPEAL — New Trial. —— The rule that an order granting a new trial for insufficiency of the evidence, will not be reversed, unless the evidence is manifestly and palpably in favor of the verdict, applies, although the trial was by the court without a jury. — *Knappen v. Swenson*, Minn., 41 N. W. Rep. 948.

4. APPEAL— Practice — Assignment of Error. —— A paper purporting to be an assignment of error, filed after time for filing has expired, no permission to file being asked, will not be considered.—*Meyers v. Territory*, Wash. Ter., 20 Pac. Rep. 685.

5. APPEAL—Suit Pending.——When it appears on the trial of a partition suit that there is a former suit pending on appeal in the supreme court, between the same parties, involving the same land, and adverse claims thereto, the trial court should suspend proceedings until the determination of the controversy in the former suit.—*Sharkey v. Kiernan*, Mo., 10 S. W. Rep. 886.

6. ASSAULT AND BATTERY — Sentence. —— Pen. Code Cal. § 245, that so much of the judgment as provided for imprisonment in the State-prison as a means of

enforcing the payment of the fine was beyond the jurisdiction of the court, and void. — *Ex parte Arras*, Cal., 20 Pac. Rep. 683.

7. ATTORNEY AND CLIENT—Disbarment. ——In a proceeding before the Supreme Court of California to disbar respondent as an attorney, under Code Civil Proc. § 287 *et seq.*, the court rendered judgment of disbarment for two years, and until a judgment obtained by a third person for money collected by said attorney should be paid: *Held*, that the punishment inflicted was within the jurisdiction of the court. — *In re Tyler*, Cal., 20 Pac. Rep. 674.

8. ATTORNEY AND CLIENT — Corporations. —— In an action by an attorney against a railroad company of which he was a director, to recover for professional services, the defense that by reason of plaintiff's position, and his representations to an investment company, which is the real owner of the road, he is estopped to assert his claim because it would injuriously affect the investment company, cannot be set up. — *Ten Eyck v. Pontiac, etc. Co.*, Mich., 41 N. W. Rep. 905.

9. BANKS AND BANKING—United States Bonds — Taxation.—— However true it be that United States bonds are not taxable as independent assets, it is a matter beyond discussion that, when the capital of a bank is in part or in whole invested in them, the shares of such banks, whether national or State, are liable to State taxation. — *First Nat. Bank v. Board of Reviewers*, La., 5 South. Rep. 408.

10. BOND—Sureties. —— A county superintendent of education, without authority, borrowed money, and transferred to the latter a portion of the school fund to reimburse him: *Held*, that the fund so obtained by the lender was held in trust for the county, and that the fact that he afterwards returned it to the county did not give him any right against the sureties of the superintendent, although the money returned by him was used in making up a deficit in the school funds for which such sureties were liable. — *Collier v. Henderson*, Ala., 5 South. Rep. 488.

11. CARRIERS OF GOODS— Limitations in Receipt.—— A condition in a receipt given to plaintiff by the express company, for property delivered to it for shipment, to the effect that the company would not be liable for any loss or damage unless claim therefor was presented within a certain time from the date of the receipt, was not binding on the plaintiff, the latter not having signed the receipt. — *Hartwell v Northern Pac. Exp. Co.*, Dak., 41 N. W. Rep. 782.

12. CARRIERS OF PASSENGERS— Care Required.——As regards approaches of cars, such as platforms, stair ways, and the like, the carrier is only bound to exercise ordinary care in view of the dangers to be apprehended.— *Kelley v. Manhattan Ry. Co.*, N. Y. 20 N. E. Rep. 383.

13. CARRIERS—Passengers—Exemplary Damages.—— Where a passenger on a railroad train is abused and insulted by the conductor, who has been informed that he had sold his ticket, which was not transferrable, and, without being given reasonable time to produce his ticket, is required to leave the train, he may recover exemplary damages. — *Louisville & N. R. Co. v. Maybin*, Miss., 5 South. Rep. 401.

14. CARRIERS OF PASSENGERS—Baggage.——A steamboat owner is not liable for loss by accidental fire of a passenger's baggage while stored in a warehouse, after the termination of the carriage, subject to delivery on call and presentation of baggage check. — *Lafrey v. Grummond*, Mich., 41 N. W. Rep. 894.

15. CHATTEL MORTGAGES — Preference. —— Where chattel mortgages are given to secure a just indebtedness to certain creditors in the forenoon, and a general assignment of all the property of the debtor which remains after satisfying such mortgages is made in the afternoon of the same day, they do not necessarily constitute a single transaction, to be regarded as a general assignment.— *De Ford v. Nye*, Kan., 20 Pac. Rep. 481.

16. CONSTITUTIONAL LAW—Statute. —— A law is not necessarily of a general nature, by reason simply of its being upon a general subject.— *State v. Shearer*, Ohio, 20 N. E. Rep. 335.

17. CONSTITUTIONAL LAW—Local Option.——The fifth amendment to the federal constitution does not prohibit congress from increasing police power, in those places where it has exclusive jurisdiction by local option laws.— *Territory v. O'Connor*, Dak., 41 N. W. Rep. 746.

18. CONTRACT—Construction. —— A contract, for the purpose of developing a mining claim, binding one to cause a shaft to be sunk to the depth of 500 feet on the vein of ore does not oblige him to continue to sink the shaft after the vein has given out entirely.— *Woodworth v. McLean*, Mo., 11 S. W. Rep. 43.

19. CONTRACTS—Construction.—— Defendant agreed with plaintiff to accept at any time within thirty days, certain shares of stock, the defendant to be entitled to all dividends or extra dividends declared during the time: *Held*, that defendant was not entitled to a dividend which had been previously declared, but which was payable during the thirty days. — *Hopper v. Sage*, N. Y., 20 N. E. Rep. 350.

20. CONTRACT—Money Paid by Mistake.——Evidence sufficient to justify verdict against express company for money paid them by mistake by plaintiff as agent, for a shortage of funds which occurred while plaintiff was injured and other employees took his place.— *Martin v. Wells Fargo & Co.*, Ariz., 20 Pac. Rep. 673.

21. CONTRACTS—Evidence.——In an action for breach of a contract to manufacture machines, where defendant was informed, pending negotiations for the contract, that many of the machines were for sale and use in another State, evidence of their market value in that State is admissible.—*Alabama Iron-works v. Hurley*, Ala., 5 South. Rep. 418.

22. CONTRACTS—Damages.——In an action to recover damages for a failure of defendants to comply with their contract to furnish lumber for plaintiff's use in the construction of a building, plaintiff may show that he could not procure lumber such as defendants had contracted to furnish in the market where it was to be delivered, and may recover the enhanced cost of procuring lumber elsewhere. — *Vickery v. McCormack*, Ind., 20 N. E. Rep. 495.

23. CORPORATIONS—Stock.—— Equity will enjoin the carrying out of an agreement the evident purpose and effect of which was to violate by indirection Const. Ga., rendering the purchase of the stock of one corporation by another and any contract tending towards a monopoly illegal and void.— *Langdon v. Branch*, Ga., 37 Fed. Rep. 449.

24. CORPORATIONS—Directors.——A director of a corporation is disqualified to vote, at a meeting of the board of directors, upon a resolution authorizing the renewal of notes in his own favor.— *Smith v. Los Angeles I. & L. Co-op. Assn.*, Cal., 20 Pac. Rep. 677.

25. CORPORATIONS—Officers—Judgment.—— Laws N. Y. 1875, ch. 611, § 21, provide that if any certificate, notice, etc., given by the officers of certain corporations are false in any material representation, all the officers who have signed them shall be jointly and severally liable for all the debts of the corporation contracted while they are officers: *Held*, that the statute imposes a penalty which cannot be enforced in another State, even though judgment has first been obtained in New York —*Attrill v. Huntington*, Md., 16 Atl. Rep. 651.

26. COUNTERCLAIM. —— In an action upon contract the defendant cannot, under ch. 66, § 97, Gen. St. 1878, set up as a counterclaim an independent cause of action arising in tort. — *Warner v. Foote*, Minn., 41 N. W. Rep. 985.

27. COURTS — Jurisdiction. —— To a petition for an injunction, defendants answered, alleging that the ordinance under which plaintiff claimed was void as an

attempt to regulate commerce between the States and also in violation of the constitution of the State of Missori: *Held*, that the record presented a question involving the construction of the constitution of the United States and of the State, within Const. Mo. art. 6, § 12, conferring jurisdiction in such cases upon the supreme court, and that the St. Louis court of appeals had no jurisdiction to hear and determine an appeal from an order dismissing the petition.—*State v. St. Louis Court of Appeals*, Mo., 10 S. W. Rep. 874.

28. COVENANTS— Against Incumbrances. —— Where, after an exchange of lands by deeds containg covenants of warranty and against incumbrances, it appears that one of the tracts is subject to a vendor's lien, equity will compel the grantor to pay off or remove the incumbrance, or give the grantee suitable indemnity.— *Thomas v. St. Paul M. E. Church*, Ala., 5 South. Rep. 508.

29. CRIMINAL LAW — Confessions. —— On a trial for burglary, evidence of a confession made by defendant when he was arrested, there having been no threats or inducements made, except that in response to his request for advice he was told that, if he was guilty, he had better "tell about it," but if not guilty he "ought not to own it," is admissible. — *Dodson v. State*, Ala., 5 South Rep. 485.

30. CRIMINAL LAW — Homicide — Variance. —— On a trial for murder, where the indictment charges an intent to kill deceased, and the proof shows an intent to kill another person, not deceased, a verdict of murder in the second degree need not be set aside for the variance.— *Territory v. Rowand*, Mont., 20 Pac. Rep. 587.

31. CRIMINAL LAW—Lotteries.—— Evidence sufficient to convict defendant of setting up a lottery under How. St. Mich. § 9331.—*People v. Elliott*, Mich., 41 N. W. Rep. 916.

32. CRIMINAL LAW — Larceny. —— Where defendant obtained goods under false representations, and it was agreed that title should remain in the seller and the goods should remain in a certain house, but she by a trick removed them: *Held*, that she was guilty of larceny.—*March v. State*, Ind., 20 N. E. 444.

33. CRIMINAL LAW—Former Acquittal. —— Where all that appears from the record in a trial for a misdemeanor is that the judge, after the trial was commenced decided to try the defendant again upon another complaint, and discharged him, this is an acquittal which may be pleaded in bar of another trial for the same offense. — *Commonwealth v. Hart*, Mass., 20 N. E. Rep. 310.

34. CRIMINAL LAW—Evidence on Former Trial. ——In a criminal prosecution, testimony given on a former prosecution for substantially the same offense, by a witness who has since gone to another State for an indefinite period, is admissible, especially as under Code Ala. 1886, § 4465, defendant could have the witness' deposition taken.—*Lowe v. State*, Ala., 5 South. Rep. 435.

35. CRIMINAL LAW—Homicide — Evidence. —— On a trial for murder, where the defense is that defendant supposed he was shooting another, who had struck him, and gone into a neighboring shop, and, so believing, was acting in self defense, evidence that such assailant, while in the shop, tried to obtain a weapon, and threatened defendant's life, is inadmissible.—*Cleveland v. State*, Ala., 5 South. Rep. 426.

36. CRIMINAL LAW—Perjury—Indictment. —— An indictment for perjury, which avers that the alleged false oath was taken in a proceeding before one P who had been duly appointed commissioner by the register in chancery, one W with authority to take the written testimony of defendant in an action for divorce, naming the parties to such action, and the court in which it was pending, sufficiently alleges the substance of the proceedings, under Code Ala. 1886, § 3908.—*Hicks v. State*, Ala., 5 South. Rep. 424.

37. CRIMINAL LAW—Homicide — Argument of Counsel. —— *Held*, improper for the district attorney to comment before the jury on the absence of certain witnesses who were present at the killing. — *People v. LeChuck*, Cal., 20 Pac. Rep. 719.

38. DAMAGES—Remote. —— Damages for delay in delivery of article which are remote and not the natural result of the breach cannot be recovered. — *Swift v. Eastern Warehouse Co.*, Ala., 5 South. Rep. 505.

39. DEPOSITIONS. —— Where depositions are taken and the parties attend and take part in the examination of the witnesses, and there is no suggestion that the depositions are not full and complete and returned in the same condition in which they were taken, the omission of the witnesses to sign or mark each separate sheet containing the evidence may be treated as an irregularity merely.— *Smith v. Groneweg*, Minn., 41 N. W. Rep. 937.

40. DESCENT AND DISTRIBUTION. —— Though a complaint by the administrator and distributees of an intestate for a distribution of assets does not aver that the latter was domiciled, or was an inhabitant of, the State, or that administration was granted in the State, judgment for plaintiffs will not be arrested for that reason, as the circuit court has general jurisdiction of the subject matter, and facts depriving it of that jurisdiction not appearing will be presumed not to exist. — *Chapell v. Schuee*, Ind., 20 N. E. Rep. 417.

41. DESCENT AND DISTRIBUTION— Adopted Child.—— Under Pub. St. Mass. ch. 148, §§ 6, 7, a grandson adopted by his grandfather can only inherit from the latter as his adopted son, and not by representation of his deceased father also. — *Delang v. Bruerton*, Mass., 20 Pac. Rep. 308.

42. DOMICILE — Lunatic — Probate. —— An alleged lunatic, for the appointment of a guardian for whom a petition is pending, can, if mentally capable, change his domicile to another State, though the guardianship resulting from such proceedings continues until his death, and the courts of the new domicile have original probate jurisdiction of his estate.—*Talbot v. Chamberlain*, Mass , 20 N. E. Rep. 305.

43. EJECTMENT—Title. —— A decree in chancery that defendant's possession of the *locus in quo* is not adverse to plaintiff's title estops him to deny such title. — *Branson v. Morgan*, Ala., 5 South. Rep. 495.

44. EQUITY— Cancellation of Deed. —— As a deed by husband and wife of her separate estate, absolute in form, reciting a valuable consideration, and purporting on its face to conform to statutory requirements, divests the wife of the legal title, she has no adequate remedy at law, and it is error to dismiss for want of equity a bill by her to have the deed canceled as a cloud upon the title to her separate estate.—*Armstrong v. Conner*, Ala., 5 South. Rep. 451.

45. EQUITY—Bill to Set Aside Deed.——A bill in equity to set aside a deed to land, where there has been acquiescence in an adverse possession for ten years before suit, is barred, under Code Ala. 1886, § 3419, unless there are excusable circumstances taking the case out of the operation of the statute.—*Scruggs v. Decatur Mineral & Land Co.*, Ala., 5 South. Rep. 440.

46. EQUITY—Reformation of Deed.—— When a mistake is made in the description of land in a deed and mortgage, equity will reform the conveyances so as to make them express the real agreements. — *Houston v. Faul*, Ala., 5 South. Rep. 433.

47. EQUITY—Accounting.——Money was advanced to a person to be used by him in raising sunken treasure, upon his promise to return a large sum, if successful. It appearing that the further prosecution of the work by the person had become impossible: *Held*, that he must account for the moneys received, and, after certain allowances, pay back the unexpended balance. — *Thomas v. Hortshorn*, N. J., 16 Atl. Rep. 916.

48. EVIDENCE. —— In an action for work done in the construction of a brick-kiln, where the main issue concerns the number of bricks laid, it is not necessary that plaintiff should prove the number laid with mathematical certainty. — *Birmingham Fire Brick Works v. Allen*, Ala., 5 South. Rep. 454.

49. EVIDENCE — Parol to Vary Writing. —— Where parties have made a written farm lease, complete on its face with minute provisions as to the rights and obligations of both parties, parol evidence is inadmissible to prove that at the date of its execution, the lessors orally agreed to drain the land. — *Diven v. Johnson*, Ind., 20 N. E. Rep. 428.

50. EVIDENCE—Examination of Accounts. ——Where evidence is the result of voluminous facts, or of the inspection of many books and papers, the inspection of which cannot conveniently take place in court, or where a witness has inspected the accounts of parties, though not allowed to give evidence of their particular contents he will be allowed to speak of the general balance or result of such examination. — *Masonic Mut. Ben. Soc. v. Lackland*, Mo., 10 S. W. Rep. 895.

51. EXCEPTIONS—Bill of — Absence of Judge. —— A bill of exceptions not presented to the trial judge, nor deposited with the clerk of the trial court, within the time fixed by statute or order, though such judge is absent from the State, and the bill is tendered to an associate judge, who marks the date of tender thereon, but declines to sign and seal it, cannot afterwards be properly authenticated by the presiding judge. — *Fechheimer v. Trounstiene*, Colo., 20 Pac. Rep. 704.

52. EXECUTION—Return. —— Under Rev. St. Mo. 1879, § 2338, an execution may issue returnable, at plaintiff's option, either to the first or second term after its issuance; and, in the absence of a showing to the contrary, it will be presumed that the sheriff who sold under the execution complied with the law.—*Blodgett v. Perry*, Mo., 10 S. W. Rep. 891.

53. EXECUTORS AND ADMINISTRATORS — Non-resident. ——Code N. Y. § 2662, relative to the grant of letters of administration, does not effect a repeal of the priority of right of letters as provided for by statute, and such right is not lost by residence in another State, where the person so entitled is a citizen of the United States.— *Libbey v. Mason*, N. Y., 20 N. E. Rep. 355.

54. EXEMPTION—Waiver.——In Pennsylvania, a waiver of a debtor's statutory exemption in favor of a lien creditor whose claim is less than the amount of such exemption, does not inure to the benefit of junior creditors, so as to prevent the debtor from claiming the balance of the exemption after the satisfaction of the senior lien.—*Hallman v. Hallman*, Penn., 16 Atl. Rep. 871.

55. FACTORS AND BROKERS—Evidence. —— Plaintiff alleged a contract by which he was employed to obtain for defendant the titles of the latter's co owner of a mining claim for not more th n a certain sum, plaintiff's commission to be the difference between that sum and the price paid: *Held*, that evidence of what a witness said to plaintiff about his understanding with defendant before plaintiff went to see defendant was irrelevant.—*Huntoon v. Lloyd*, Mont., 20 Pac. Rep. 693.

56. FACTORS AND BROKERS—Commission. ——A real-estate broker induced one P to purchase certain land of defendant. Afterwards P discovered that there was a large amount of purchase money due on the land: *Held*, that the fact that P refused to complete the contract, on account of a defect in the title, although the purchase money stipulated to be paid by him would have enabled defendant to clear off the incumbrance, could not defeat the right of the broker to recover his commission from defendant.— *Birmingham Land & Loan Co. v. Thompson*, Ala., 5 South. Rep. 473.

57. FORCIBLE ENTRY.——To constitute the offense of forcible entry, under Code N. C. § 1028, the premises must be in the actual, not merely constructive, possession of the person whose possession is charged to have been interfered with. — *State v. Bryant*, N. Car., 9 S. E. Rep. 1.

58. FRAUD—Burden of Proof.——A charge that "fraud is never presumed, but the burden rests upon one claiming fraud to make it out by clear and convincing proof," is not misleading, as conveying the impression that fraud must be proved beyond a reasonable doubt. —*Wallace v. Mattice*, Ind., 20 N. E. Rep. 497.

59. GAMING—Securities.—— Where one transfers certain bonds in his possession, but of which he is not the owner, to A to obtain money for the purpose of buying "cotton futures," there being no intention that any cotton shall be delivered, but simply that the difference in price shall be settled according to the market fluctations, and A advances the money with knowledge of the purpose for which it is to be used, he cannot hold the bonds as against the real owner.— *Lee v. Boyd*, Ala. 5 South. Rep. 489.

60. HIGHWAYS—Sidewalks— Duty of Abutter. —— A land-owner is under no legal obligation to build or keep up a walk along the highway adjoining his land, and is not liable for personal injuries sustained by a party on account of the narrowness of such walk or its defective condition. — *Fletcher v. Scotten*, Mich., 41 N. W. Rep. 901.

61. HOMESTEAD—Conveyance to Wife—Sufficiency.—— Under Civil Code Cal. § 1265, a declaration of a homestead by a husband on his separate property vests a joint title thereto in himself and wife, and a subsequent conveyance of the property by him to his wife is valid, and passes the complete title to the wife, subject to the homestead.—*Burkett v. Burkett*, Cal., 20 Pac. Rep. 715.

62. HOMESTEAD—Conveyance. —— In a conveyance of homestead executed prior to act Ala. April 23, 1873, requiring the signature and separate examinations of the wife in conveyances of the homestead, it is sufficient that the wife voluntarily signed the deed, and it was attested and probated in the form prescribed by statute for ordinary conveyances, without any separate examination of the wife. — *Jones v. Roper*, Ala., 5 South. Rep. 459.

63. HOMESTEAD—Extent.——Where part of a tract of land described in a declaration of homestead is actually appropriated for family use by the declarant, but the remaining portion is used principally for the business of general blacksmithing and wagon building, carried on in a building thereon, such latter portion forms no part of the homestead claim. — *In re Allen*, Cal., 20 Pac. Rep. 679.

64. HUSBAND AND WIFE— Wife's Separate Estate.—— Under Code Ala. 1876, § 2706, by which the husband, as trustee of the statutory separate estate of the wife, had the right to control it without liability to account to the wife for the rents, etc., land purchased in the name of the wife with such rents could not be subjected to the husband's debts.— *Long v. Efurd*, Ala., 5 South. Rep. 482.

65. HUSBAND AND WIFE— Wife's Separate Estate.—— Where a married woman has received personal property, as a gift from her father, and, with her husband's consent, has always managed it as her own, and with it purchased other property in her own name, the property and the proceeds of its sale remain her property, and not her husband's. — *Botts v. Gooch*, Mo., 11 S. W. Rep. 42.

66. HUSBAND AND WIFE—Conveyance.——Under the Alabama statutes, a deed by a husband and wife of her separate estate, without fraud in its execution, the consideration of which was in part a debt for articles of support furnished the family, and in part a debt due by the husband, vests a legal title in the grantee, and is a complete defense to ejectment by the wife. — *Conner v. Armstrong*, Ala., 5 South. Rep. 449.

67. HUSBAND AND WIFE—Wife's Separate Estate.—— A married woman cannot bind her statutory separate estate so as to charge it with a contract in the form of a will agreeing to convey a portion of it to certain parties on her death. — *Bolman v. Overall*, Ala., 5 South. Rep. 455.

68. HUSBAND AND WIFE — Wife's Separate Property — Liability for Husband's Debt. —— Under Code Miss. 1880, § 1177, a wife is not liable for debts incurred by a husband in carrying on a mercantile business in his own name with money belonging to her. — *Leinkauf v. Barnes*, Miss., 5 South. Rep. 402.

69. INJUNCTION—Bond—Estoppel. —— In a suit on a bond given for an injunction against the further prosecution of a suit therein recited, the obligors are estopped from denying that there was such a suit pending.—*Person v. Thornton*, Ala., 5 South. Rep. 470.

70. INJUNCTION.——Equity will, at the suit of persons holding the complete equitable title to land, restrain as to their estate the levy of an execution issued on a judgment against the person holding the legal title. — *Parks v. People's Bank*, Mo., 11 S. W. Rep. 41.

71. INSURANCE—Policy. —— Where a policy provides that it shall be void if the assured was not the sole and unconditional owner of the property and when it was insured plaintiff described it as his, it is a good defense to show that he had but a leasehold and executory contract to purchase. — *Brown v. Commercial Fire Ins. Co.*, Ala., 5 South. Rep. 500.

72. INSURANCE—Accident Policy. —— *Held*, that the terms "external and visible signs upon the body of the insured" only applied to bodily injuries not resulting in death.—*Paul v. Travelers' Ins. Co.*, N. Y., 20 N. E. Rep. 847.

73. INSURANCE—Life Insurance—Creditor.——A creditor who takes out insurance certificates ammounting to $6,500, on the life of his debtor, who owes him $1,000, the insurance being taken out in the mutual aid associations, where the amount to be realized depends on the number and solvency of the members, and the creditor paying the mortuary dues and assessments, and actually realizing only $2,124.82 on the certificates, on the debtor's death is entitled to retain the balance remaining, after deducting the debt, interest and expenses.— *Rittler v. Smith*, Md., 16 Atl. Rep. 890.

74. INTOXICATING LIQUORS— Local Option — Constitutional Law. —— The local option law of Washington Territory, giving to "precincts of Washington Territory" power to repeal the existing law, and prohibit the sale of liquor, is invalid as a delegation of legislative authority.—*Turner v. Saxon*, Wash. Ter., 20 Pac. Rep. 685.

75. INTOXICATING LIQUORS — Constitutional Law.—— Act Ala. Nov. 27, 1886, entitled "An act to amend an act approved December 12, 1882, to amend § 1544 of the Code of Alabama, so far as applies to Butler county, Ala., so as to authorize the probate judge of said county to order an election to determine whether spirituous, vinous, or malt liquors," etc., "shall be sold, given away, or otherwise disposed of, in precinct 12 of said county," is, as the latter part of the title indicates, a complete law, original in form, providing for a "local option" election in that precinct, and amends no previous law, except by implication: *Held*, that the reference in the title to the amended act may be regarded as surplusage; and, so regarded, the act is not violative of Const. Ala. 1875, art. 4.—*Gandy v. State*, Ala., 5 South. Rep. 420.

76. INTOXICATING LIQUORS—Jury — Qualification.—— The fact that one, as constable, is specially charged with enforcing the law for the suppression of intemperance, does not disqualify him from acting as a juror on a trial for keeping a liquor nuisance in another precinct.—*State v. Cosgrove*, R. I., 16 Atl. Rep. 900.

77. INTOXICATING LIQUORS — License Tax—Club.—— A club which distributes liquors among its members, receiving pay for them as they are distributed by the glass, the proceeds going into the treasury of the club, to be used in purchasing other liquors, or in paying expenses, is taxable as a retail dealer.— *People v. Soule*, Mich., 41 N. W. Rep. 908.

78. IRRIGATION—Polution of Stream.—— A complaint alleging that the relators are owners of land which is irrigated by the waters of a certain creek; that defendants are operating stamp mills and polluting the stream with mineral refuse therefrom, thus rendering the water unfit for irrigation purposes, and praying that defendants be perpetually enjoined from so polluting the water, does not present a case *publici juris*, so as to give the supreme court original jurisdiction under Const. Colo. art. 6, § 2. — *People v. Rogers*, Colo., 20 Pac Rep. 702.

79. IRRIGATION—Ditches.—— Under Act Colo. 1881 § 1, a ditch constructed by one on his land for irrigating it cannot be enlarged, against his consent, for the purpose of conveying water to the land of others, where there are other practicable routes, and especially where such ditch is not of a uniform grade, and its enlargement would greatly diminish its usefulness. — *Downing v. Moore*, Colo., 20 Pac. Rep. 766.

80. JUDGMENT—Amendment. —— An amendment *nunc pro tunc*, of an insufficient statement by confession will not be allowed to the prejudice of subsequent judgment creditors whose executions have been levied. — *Auerbach v. Behnke*, Minn., 41 N. W. Rep. 946.

81. JURY—Drawing.—— Manner of drawing jury held a substantial compliance with the statutes. — *Long v. State*, Ala., 5 South. Rep. 443.

82. JUSTICES OF THE PEACE—Forcible Detainer. —— Neither the title nor right of possession can be made an issue in an action under the Montana forcible detainer act, and hence a justice of the peace properly refused to certify such action to the district court without trial. —*Sheehey v. Flaherty*, Mont., 20 Pac. Rep. 687.

83. LIBEL AND SLANDER — Privileged Communication. ——Director of a company against which stockholders file suit alleging fraud on part of officers to control company stock cannot maintain action for defamatory matter in petitions though it was false and malicious.— *Runge v. Franklin*, Texas, 10 S. W. Rep. 721.

84. LIBEL AND SLANDER. —— Words charging a wife with deserting her husband in his sickness are actionable *per se*.—*Smith v. Smith*, Mich., 41 N. W. Rep. 499.

85. LIBEL AND SLANDER. —— In an action for libel, a charge that plaintiff had been "tried for conspiracy and libel, and convicted," is justified, if literally true, though plaintiff, after the conviction and before the publication, had succeeded in having one case against him dismissed, and had taken an appeal in the other.— *Boogher v. Knapp*, Mo., 11 S. W. Rep. 45.

86. LOGS AND LOGGING— Obstruction of Stream. —— Where defendants, having a right to construct a boom for logging purposes, in a stream that had been made a public highway for the purposes of logging, continue it a reasonable time, they are not liable for damages caused by an obstruction made by a log jam, if they exercise due care to prevent it, or to break it when formed.—*Harold v. Jones*, Ala., 5 South. Rep 438.

87. MALICIOUS PROSECUTION— Custom and Usage.—— Plaintiff, an architect, when prosecuted at the instance of defendant, for larceny from the latter of plans for a building, could show, in an action for malicious prosecution, that the property of the drawings was in him by a universal custom, and that the builder was entitled to them only during the time of construction; and that defendant had erected buildings by such plans. — *Lunsford v. Deitrich*, Ala., 5 South. Rep. 461.

88. MANDAMUS.——*Mandamus* will only lie when there is a clear legal right and not in behalf of one who seeks to have certain shares transferred to him on books of corporation where the assignor claims the right to redeem. — *Brunsville Turnpike Co v. State*, Ind., 20 N. E. Rep. 421.

89. MANDAMUS.——Determining whether relator is or not entitled to a peremptory *mandamus* compelling the respondent judge to grant him a writ of injunction depends upon whether the law entitles him to it as of right. If the law gives the respondent the discretion to grant or refuse it, the *mandamus* will not go. — *State v. Righton*, La., 5 South. Rep. 416.

90. MASTER AND SERVANT—Fellow-servant.——Where the regulations of a railroad company provide that, in case a train becomes divided, the front breakman shall go to the rear of the front portion, and signal the engineer which way to move, etc., and also that in case the conductor is cut off from the train, the right to command shall devolve on the engineer, the engineer

and breakman are only fellow-servants, in case of the breaking of a train, when the engineer does not assume the command, and both are acting in the line of their separate duties. — *Louisville & N. R. v. Martin*, Tenn., 10 S. W. Rep. 772.

91. MASTER AND SERVANT—Contract of Hiring.——An employee cannot recover on a contract of hiring, by the terms of which he is to work a certain number of hours per day, for parts of days less than the prescribed number of hours, where his failure to work is not due to any interference or neglect on the part of the employer; though such contract provides that the employee is to be paid a certain amount per hour. — *Wilson v. Lyle*, Penn., 16 Atl. Rep. 861.

92. MASTER AND SERVANT — Liability of Lessor Railroad Company. —— One employed as conductor by a railroad company operating as lessee, without authority of statute, a railroad belonging to another corporation, cannot recover of the latter corporation for injuries sustained on account of a defect in an engine owned and controlled by the lessee. — *East Line & Red River R. Co. v. Culberson*, Tex., 10 S. W. Rep. 706.

93. MECHANICS' LIENS—Subcontractors. ——Mechanics' lien exists in favor of subcontractors and others, nothwithstanding prior payment of the full contract price, in good faith, by the owner to his contractor; also that such liens are not limited to the amount agreed to be paid by the owner to his contractor. — *Henry & Coatsworth Co. v. Evans*, Mo., 10 S. W. Rep. 868.

94. MECHANIC'S LIEN—Notice.——Under the Colorado lien act of 1881, § 4, unless a statement is served as required, the claimant is not entitled to a decree establishing his lien. — *Greeley, S. L. & P. R. Co. v. Harris*, Colo., 20 Pac. Rep. 764.

95. MINES AND MINING. —— A relocation of a mining claim is an implied admission of the validity of the original location, and an assertion that the relocator claims a forfeiture by reason of a failure on the part of the original locator to make his annual expenditure. — *Wills v. Blain*, N. Mex., 20 Pac. Rep. 798.

96. MINES AND MINING— Parol Evidence. —— Under Rev. St. U. S. § 2324, as to a location of a mining claim parol evidence is admissible to show that a natural object or monument referred to in the location, but not designated therein as a permanent monument, is in fact permanent.— *Seidler v. Lafare*, N. Mex., 20 Pac. Rep. 789.

97. MORTGAGES—Assignment.——In Alabama, an assignment of a mortgage, to be effectual to convey the mortgagee's legal title and enable the assignee to maintain ejectment, must be by such a conveyance in form and words as is required to convey the legal title to land in ordinary cases.—*Sanders v. Cassady*, Ala., 5 South. Rep. 503.

98. MORTGAGE—Foreclosure — Statute of Frauds.—— Sales of land under foreclosure are not within the statute of frauds.—*Andrews v. O'Mahoney*, N. Y., 20 N. E. Rep. 374.

99. MORTGAGES—Foreclosure—Limitation.——A purchaser at sheriff's sale, under a judgment pending foreclosure of a senior mortgage, is not a necessary party to the foreclosure, and, when joined by an amended complaint, cannot set up a limitation which had not run when the original complaint was filed. — *Wise v. Griffith*, Cal., 20 Pac. Rep. 675.

100. NEGLIGENCE—Drunkenness. —— Question under the evidence as to negligence of railroad company in killing intoxicated man.—*Columbus & W. Ry. Co. v. Wood*, Ala., 5 South. Rep. 463.

101. NEGLIGENCE—Jurisdiction.——When the statute in a State where a death is caused by wrongful act gives a right of action to the personal representative, that right may be enforced in another State having a similar statute, in a court having jurisdiction of defendant. — *Cincinnati, H. & D. R. Co. v. McMullen*, Ind., 20 N. E. Rep. 287.

102. NEG OTIABLE INSTRUMENTS—Note. —— One who has given a note in part payment of certain timber cannot, after he has received all that he is entitled to under the contract, defend against the note on the ground that such timber at the time of the sale was on land belonging to the wife of the vendor, and that he had no right to sell it. — *McKenzie v. Wimberly*, Ala., 5 Sout. Rep. 468.

103. NEGOTIABLE INSTRUMENTS. —— The payee of a note transferred it to a creditor in consideration of the discharge of a debt owing to the creditor, but, as the amount of such debt was not fixed, the creditor agreed that, if the debt fell short of the amount of the note, he would pay the difference to such payee: *Held*, that the creditor became the absolute owner of the note. — *Wilson v. Law*, N. Y., 20 N. E. Rep. 399.

104. NEGOTIABLE INSTRUMENTS— Lost Note. —— Evidence sufficient to account for non production of note so as to put defendant on his defense.—*Clift v. Moses*, N. Y., 20 N. E. Rep. 392.

105. NEGOTIABLE INSTRUMENTS — County Warrants. ——A county warrant has not the qualities of a negotiable paper, and the plaintiff stands in the shoes of his assignor, the original holder. — *Bank of Santa Cruz County v. Bartlett*, Cal., 20 Pac. Rep. 682.

106. PARTITION—Equity. —— As incidental to a partition between heirs, a court of equity may adjust and equalize advancements, though jurisdiction of controversies as to advancements is conferred on the probate court.—*Marshall v. Marshall*, Ala., 5 South. Rep. 475.

107. PARTIES — Real Party in Interest. —— A suit brought by one in his individual name, but in reality for the benefit of non residents, as owners of the claim sued on, must be viewed as instituted by the constituents themselves, who must be considered as the real plaintiffs in court. — *Smith v. Atlas Cordage Co.*, La., 5 South. Rep. 413.

108. PARTNERSHIP—Rights of Partners—Equity—Jurisdiction.—— Defendants were partners, doing banking business, with capital stock divided into shares, and, at a time when the partnership was in fact hopelessly insolvent, fraudulently represented that it was in a prosperous condition, declared large dividends, increased the nominal capital stock, and sold complainants shares of such new stock: *Held*, that a bill in equity is the proper remedy to recover their stock payments, money they had on deposit at the time of the bank's failure, and the money they had been compelled to contribute as partners to pay its debts. — *Appeal of Andriessen*, Penn., 16 Atl. Rep. 840.

109. PARTNERSHIP—Attachment.——A, being indebted to plaintiff, formed a partnership, and transferred his stock of goods to the firm, and the latter then bought new stocks, with which the old was intermingled. Plaintiff afterwards attached part of the goods in the hands of A, but there was no evidence that the latter had become the owner thereof, as his individual property, or that the partnership had been dissolved. No notice of such dissolution was given, and goods purchased by the firm continued to be received and mingled with the partnership stock: *Held*, that the goods attached by plaintiff were partnership property, and that plaintiff's claim should be postposed to the claims of subsequently attaching creditors of the firm, the latter having become insolvent.—*First Nat. Bank of Clinton v. Brenneisen*, Mo., 10 S. W. Rep. 884.

110. PLEADING—Demurrer. —— Under Rev. St. Ind. § 357, providing that a cause for a demurrer to a reply shall be "that the facts therein stated are not sufficient to avoid the answer," a demurrer which assigns as a cause that the reply does not state facts sufficient to constitute a good reply to the defendant's answer, to which it is directed, is not sufficient.—*Peden v. Mail*, Ind., 20 N. E. Rep. 493.

111. PROBATE PRACTICE— Constitutional Law. —— The statute requiring, as a condition precedent to probate proceedings for the settlement of estates, the payment to the county treasurer of specified sums arbitrarily prescribed with reference to the value of the estate in

question: *Held*, unconstitutional. — *State v. Gorman*, Minn., 41 N. W. Rep. 948.

112. PUBLIC LANDS—Homestead—Trespassers. —— A mere trespasser on public lands with an enclosure erected and maintained contrary to express provisions of act Cong. Feb. 25, 1885, cannot by such occupancy prevent a homestead entry of the land by a citizen who goes peaceably upon a portion of the tract. — *Whitaker v. Pendala*, Cal., 20 Pac. Rep. 680.

113. RAILROAD COMPANY. —— Under act N. Y. May 6, 1884, several applications may be made by a company to determine whether the railroad ought to be constructed and operated along certain streets, provided such streets are named in the company's articles of association as being streets through which it is proposed to construct the railroad.—*In re People's R. Co.*, N. Y., 20 N. E. Rep. 367.

114. RECEIVERS—Waiver. —— Leave to sue a receiver is jurisdictional, and cannot be waived by him, and under Code Wash. Ter. § 81, the question may be raised at any stage of the case in the district or supreme court.—*Brown v. Rauch*, Wash. Ter., 20 Pac. Rep. 785.

115. REPLEVIN—Pleading.——In an action to recover the possession of specific personal property the defendant may, under the general denial, prove ownership or the right of possession of the property in controversy in a third person. — *Chamberlin v. Winn*, Wash. Ter., 20 Pac. Rep. 780.

116. REPLEVIN — Sequestration — Affidavit. —— In sequestration of movable property, based on the vendor's privilege, an affidavit to the debt, to the privilege, and to the fear that "the defendant will conceal, part with, or dispose of the movable in his possession during the pendency of the suit," fills all the requirements of the law. — *Lowden v. Robertson*, La., 5 South. Rep. 405.

117. REPLEVIN—Verdict.——In replevin a verdict that the defendant is entitled to the possession of the property sued for is not contrary to law because it gives the value of the property. The latter will be treated as surplusage. — *Van Meter v. Barnett*, Ind., 20 N. E. Rep. 426.

118. SEDUCTION—Chastity.——"Unchaste," as used in statute, providing that no conviction for seduction can be had if it is proved that the one seduced was unchaste, means actual lewd conduct and not merely bad reputation —*Hussey v. State*, Ala., 5 South. Rep. 484.

119. SHERIFFS—Attachment.——A sheriff who, under an attachment regular on its face, seizes goods in the possession of one not a party to the writ, to whom the attachment defendant, the real owner, has transferred the goods to defraud creditors, need not, to justify such seizure, prove the regularity of the proceedings prior to the attachment. — *Buddee v. Spangler*, Colo., 20 Pac. Rep. 760.

120. SPECIFIC PERFORMANCE—Mistake.——On bill for specific performance of contract to convey land where boundary line was misunderstood: *Held*, that as the defendant had been mistaken as to a material fact by the omission of plaintiff to point out the lines, specific performance would be denied, whether the omission was intentional or unintentional. — *Campbell v. Durham*, Ala., 5 South. Rep. 507.

121. TAXATION—Railroad Lands. —— Lands of a railway company, which are exempt from taxation "until sold and conveyed," if conveyed before May 1st, are subject to taxation for the then current year. If not conveyed until after that date, they are not. — *Martin County v. Drake*, Minn., 41 N. W. Rep. 942.

122. TAXATION—Form of Tax Deed.—— Although the form prescribed for tax deeds by 2 Wag. St. Mo. p. 1205, is prepared for a single tract, it is no objection to the admission of a tax deed in evidence that it contains ten different tracts, in ten different sections, in tabulated and abbreviated form, when no recital or statement prescribed by the form is omitted, and the abbreviations used are expressly authorized by statute. — *Allen v. White*, Mo., 10 S. W. Rep. 881.

123. TELEGRAPH COMPANY — Damages. —— In action to recover damages for failure to deliver telegram on Sunday no recovery can be had unless it also appears there was a reasonable necessity for transmitting the message that day. — *West. Union Tel. Co. v. Yopst*, Ind., 20 N. E. Rep. 222.

124. TELEGRAPH COMPANY — Damage. —— In action for damages for delay in delivering telegram, where plaintiffs claim the difference between the price of lot of ground offered to him and its actual value, the damages claimed are not too remote or speculative. — *Alex v. West. Union Tel. Co.*, Miss., 5 South. Rep. 397.

125. TENANCY IN COMMON — Improvements. —— Defendant, being a tenant in common with plaintiffs, and holding much the largest interest in the property, had a right to make improvements in good faith and for the betterment of the property, whether she had notice of plaintiff's title when she made the improvements or not.—*Allewan v. Hawley*, Ind., 20 N. E. Rep. 441.

126. TRESPASS—Criminal Prosecution— Warning.—— Under Code Ala. 1886, § 3874, declaring that any person who, without legal cause, enters the premises of another, after warning, etc., that there must be a warning first, and an entry afterwards. One already in possession, even though a trespasser, or there by implied permission, cannot, by a warning then given, be converted into a violator of the statute. — *Goldsmith v. State*, Ala., 5 South. Rep. 480.

127. TRESPASS—Parties.——A complaint alleging that plaintiff was lawfully in possession of certain premises as tenant, and that defendant wrongfully entered thereon, and committed diverse trespasses and injuries to the land, is not demurrable for the non joinder of the land-lord as party plaintiff. — *Strohlburg v. Jones*, Cal., 20 Pac. Rep. 705.

128. TRUSTS—Accounting. —— In an action to require an alleged trustee to account for the proceeds of certain property of his *cestui que trust*, a paragraph of the answer may admit the receipt of a portion of the fund and allege in avoidance that the defendant had accounted therefor with his *cestui que trust*, and deny the other material allegations of the complaint. — *Colglazier v. Colglazier*, Ind., 20 N. E. Rep. 490.

129. USURY—Interest.——A promissory note, bearing interest, payable semi-annually, is not usurious, although it stipulates that the semi-annual installments of interest shall bear interest at the same rate if not paid when due.—*Taylor v. Hiestand*, Ohio, 20 N. E. Rep. 345.

130. VENDOR AND VENDEE.——Where a land contract set forth in the complaint in an action for specific performance contains a complete and certain description, on its face, it is a matter of defense that the description is false.—*Williams v. Langevin*, Minn., 41 N. W. Rep. 936.

131. WILLS—Construction. —— A clause in a will directing the accumulation of a fund for the benefit of testator's son, then in being, to be paid in installments as the legatee shall reach the ages of 21, 25, and 30 years, respectively, is valid. — *Claflin v. Claflin*, Mass., 20 N. E. Rep. 454.

132. WILLS—Deed — Requisites. —— An instrument conveying property, but showing on its face that the use thereof is reserved during the maker's life-time, may be either a deed or will, the class to which it belongs being determinable upon all the circumstances surrounding the parties and attending its execution.—*Sharp v. Hall*, Ala., 5 South. Rep. 497.

133. WITNESS—Competency. —— The vendor of land, who transferred to complainant the purchase money notes in suit, having died, the testimony of the vendee, as to transactions and statements between himself and the deceased vendor, in regard to the sale, is incompetent.—*Hodges v. Denny*, Ala., 5 South. Rep. 492